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THE EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY

European Gender Equality Law Review

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EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY

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Contents

Introduction

Susanne Burri[*]

This first issue of the European Gender Equality Law Review (EGELR) provides information on policies, legislative developments and case law in the field of gender equality both at the European level and at the level of the 27 Member States of the European Union and the EEA countries (Iceland, Liechtenstein and Norway). This (electronic) publication is produced by the European Network of Legal Experts in the field of Gender Equality, a Network financed by the funding programme PROGRESS of the European Union. This Community programme for Employment and Social Solidarity has been set up to support financially the implementation of the objectives of the European Union in the fields of employment and social affairs. One of the specific objectives of the PROGRESS programme is to support the effective implementation of the principle of gender equality and to promote gender mainstreaming in all Community policies.[1]

A network of legal experts in the field of equal treatment of men and women has assisted the Commission in its monitoring tasks since 1984 by providing information to the European Commission. Besides the bottom-up and top-down information exchange between the national legal experts and the European Commission, an information exchange also takes place between the national experts. The continuity of the work of the network was enhanced due to the fact that Sacha Prechal was the coordinator of the network between 1991 and 2007 and most experts have participated in the network for some years. They have built up long-lasting common experiences in this field. Sacha Prechal is still involved in the European Network of Legal Experts in the field of Gender Equality as a member of the executive committee. Many network documents were in the past meant for internal use by the European Commission and were not published. However, some electronic documents are available to the public (see below). Up to 2007, Bulletins (in English and French) provided information on developments in the field of gender equality on a regular basis and different thematic reports were published, for example on the gender pay gap and different forms of leave. Each year, the main developments in EU gender equality law both at the EU and the national level were reported in a general report, which was also published on the European Commission's website.

The current European Network of Legal Experts in the field of Gender Equality started its activities in January 2008. The main objectives of the Network are to give independent advice, analysis and relevant information to the European Commission on national legislation and policies in the field of gender equality and to contribute to the Commission's review of the effectiveness of existing legislation and, if necessary, the development of new legislative instruments at EU level in this field. This area not only includes the application of the different directives on equal treatment between women and men in (access to) employment and in access to and the supply of goods and services, but is also closely related to issues such as the reconciliation of work,

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[1] See for more information: http://ec.europa.eu/employment_social/progress/index_en.html, accessed 15 June 2008.

private and family life, sexual harassment, domestic violence, and women in decision-making.

The European Network of Legal Experts in the field of Gender Equality is composed of 30 high-level independent national legal experts, working as academics, lawyers or with non-governmental organizations in the field of gender equality. There is one national expert for each Member State and EEA country. The School of Law of Utrecht University, in the Netherlands, is responsible for the co-ordination of the Network. An executive committee – in which three independent senior experts and the co-ordinator participate – ensures the overall quality of the work of the Network and meets on a regular basis with the representatives of the Unit 'Equality, Action against Discrimination: Legal Questions' of the European Commission. The whole Network meets twice a year in Brussels in order to discuss recent relevant developments across the Community with representatives of the Commission.

The Network's programme includes the publication of this biannual European Gender Equality Law Review (available in English, French and German); the publication of a general report on Gender Equality Law in the EU once a year (also available in English, French and German); and several thematic reports (in English), some of which will be published. Furthermore, (unpublished) flash-reports inform the Commission each month of relevant developments and deal with various ad hoc requests from the Commission.

In this issue of the European Gender Equality Law Review Isabelle Chopin provides a brief introduction to the European Commission's European Network of Legal Experts in the non-discrimination field. This Network fulfils similar tasks to the European Network of Legal Experts in the field of Gender Equality concerning relevant developments in the field of anti-discrimination as regards the other grounds mentioned in Article 13 EC: race and ethnicity, religion and belief, age, disability and sexual orientation. Both Networks meet once a year during a joint meeting and legal seminar in Brussels. Such a meeting enables the members of both Networks to discuss equality issues common to all the discrimination grounds mentioned in Article 13 EC.

In October 2007, the Unit 'Equality, Action against Discrimination: Legal Questions' of the European Commission organized a Conference on 50 Years Gender Equality Law. Sacha Prechal – one of the key-note speakers – highlighted the impact of EU Gender Equality Law, in particular the case law of the European Court of Justice (ECJ) on the anti-discrimination Directives adopted in 2000 and Community law in general. In this issue of the EGELR she analyses some issues in the gender equality case law which have considerably influenced Community law in general in other areas, such as the free movement of workers or taxation.

During the meeting of the European Network of Legal Experts in the field of Gender Equality in April 2008 in Brussels, attention was paid to some aspects of the Lisbon Treaty and the Charter of Fundamental Rights in relation to the *acquis communautaire* in the field of gender equality. Sophia Koukoulis-Spiliotopoulos, the Network's Greek national expert, presented an introduction to this subject. In her article in this issue of the EGELR, based on this introduction, she submits that the Charter, which is meant to codify the *acquis*, reflects the *gender acquis* in many fields. But she also points to some shortcomings of the Charter. She concludes that the *acquis communautaire* cannot be restricted, but that some confusion might arise regarding the scope, content and justiciability of fundamental rights.

The European Gender Equality Law Review further provides an update of policies, legislative developments and case law at the European level, including not only Community law but also the case law of the European Court of Human Rights and

recent decisions by CEDAW, the UN Committee on the Elimination of Discrimination against Women. The main part of this review addresses recent developments in the 27 Member States and the EEA countries. This includes an overview of policies, legislative developments, the case law of the national courts and decisions by equality bodies, surveys etc.

The members of the editorial board hope that these contents will be of interest to the reader. Reactions, comments and suggestions regarding the review are, of course, very welcome. Proposals for future articles can be submitted to the co-ordinator (see the contact address below).

The publications of the European Network of Legal Experts in the field of Gender Equality can be found at:
http://ec.europa.eu/employment_social/gender_equality/legislation/bulletin_en.html.

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The European Network of Legal Experts in the non-discrimination field

Isabelle Chopin[*]

Following the adoption of EC Directives 2000/43 and 2000/78, in 2002 four single-ground experts groups were created following a call for tenders from the European Commission. These were a group on sexual orientation discrimination, coordinated by Leiden University; a group on disability discrimination, coordinated by Galway University; a group on race and ethnic origin discrimination and a group on religion and belief discrimination, both coordinated by the Migration Policy Group. These four groups provided independent information on the transposition process of Directives 2000/43/EC and 2000/78/EC in the 15 EU Member States (those that were already members before 1 May 2004) to the European Commission. These four groups presented national country reports thoroughly analysing national anti-discrimination law, responded to specific European Commission requests and needs for information and produced a joint paper on harassment.

In mid 2004, the European Commission launched a call for tenders for the creation of a single group of legal experts dealing with race and ethnicity, religion and belief, age, disability and sexual orientation. Human European Consultancy and the Migration Policy Group together established and managed this single Network of independent legal experts in the field of non-discrimination on behalf of the European Commission for three years. In 2007 the European Commission launched a tender for a new contract for the period 2008-2011, which was again awarded to the consortium of Human European Consultancy and the Migration Policy Group.

Similar to the previous groups of experts, this Network provides independent information and advice on the transposition and implementation of the two Directives in all 27 Member States as well as on national initiatives in the field on anti-discrimination legislation and some related policy developments. It analyses the potential conformity of national developments with the requirements of Community law. The Network reports on the impact of national court rulings that have the effect of establishing jurisprudence on the level of protection provided by national law against discrimination as well as on the impact of judgments of the European Court of Justice and the European Court of Human Rights on national law.

The European Network of Legal Experts in the non-discrimination field produces 27 national country reports analysing national anti-discrimination legislation, checking the correct transposition and informing the reader about other important related issues at the national level.[1] Executive summaries of these comprehensive reports are also available in English and French. Comparative analyses of national reports have been published in English, French and German. The Network is constantly monitoring the national situation and informing the Commission in due time of any major developments, whether they amount to the adoption of legislation or case law. It also produces the Legal Chapter for the European Commission's Annual Equality Report.

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[*] Deputy Director, Migration Policy Group.

[1] All Network publications are available at http://ec.europa.eu/employment_social/fundamental_rights/policy/aneval/legnet_en.htm

The Network has been producing the European Anti-discrimination Law Review,[2] a legal bulletin that aims to present an overview of the developments in European anti-discrimination law. The review includes articles on specific topics as well as an overview of the European Court of Justice and the European Court of Human Rights updates. It contains a section describing the latest developments at 27 national levels.

The Network has also produced thematic reports that are available in English, French and German on the following various anti-discrimination issues.

- Age Discrimination and European Law;
- The Prohibition of Discrimination under European Human Rights Law – Relevance for EU Racial and Employment Equality Directives;
- Measuring Discrimination – Data Collection and EU Equality Law;
- Religion and Belief Discrimination in Employment – The EU Law;
- Beyond Formal Equality – Positive Action under Directives 2000/43/EC and 2000/78/EC;
- Segregation of Roma Children in Education – Addressing Structural Discrimination through the Race Equality Directive;
- Remedies and Sanctions in EC Non-discrimination Law;
- Catalysts for Change? – Equality Bodies according to Directive 2000/43/EC; and
- Equal Rights versus Special Rights? – Minority Protection and the Prohibition of Discrimination

The Network also organises an annual legal seminar dedicated to gathering representatives of national governments, specialised equality bodies, selected NGOs and members of the Network to enhance expertise and dialogue on how these developments are to be interpreted (in conformity with Community law or not) and how certain legal problems can be best addressed.

The Network comprising 27 country experts, one for each EU Member State, is managed by Human European Consultancy and the Migration Policy Group and consists of a management team, a research team including senior researchers, ground coordinators and national experts.

The Network is set up as follows:

Management Team:
Project Director: Piet Leunis, Human European Consultancy
Content Manager and Executive Editor Isabelle Chopin, Migration Policy Group
Support Manager: Ilkana Hasanova, Human European Consultancy
Managing Editor: Georgia Tsaklanganos, Migration Policy Group

Research Team:
***Senior Experts*:**
Christopher McCrudden, Oxford University
Christa Tobler, Leiden University
Olivier de Schutter, Catholic University of Louvain-La-Neuve
Jan Niessen, Migration Policy Group

[2] The sixth issue of the Review will be published in October and is available freely after registration at the following address: review@non-discrimination.net

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Isabelle Rorive, Free University Brussels (religion and belief)
Mark Bell, University of Leicester (sexual orientation)
Lilla Farkas, Migration Policy Group (race and ethnic origin)
Mark Freedland, Oxford University (age)
Lisa Waddington, Maastricht University (disability)
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Lorenzo Cachon (Spain)
Per Norberg (Sweden)
Colm O'Cinneide (the United Kingdom)

EU Gender Equality Law: a source of inspiration for other EU legal fields?

Sacha Prechal[*]

Introduction

As is well documented elsewhere,[1] EU anti-discrimination directives[2] strongly build upon EU gender equality law. For instance, they share provisions on remedies, enforcement, access to the courts or protection against victimization.[3] They also share the key concepts, such as direct discrimination, indirect discrimination and harassment.

In fact, as regards the notion of indirect discrimination, for instance, there has been an interesting interplay between gender equality law, discrimination on the ground of nationality (to some extent) and the other directives (from 2000). When the ECJ originally developed the concept of indirect discrimination on grounds of nationality or sex, it pointed out that the use of criteria other than nationality or sex may lead to the same result and that the use of these criteria is prohibited unless an objective justification exists. In 1997 indirect sex discrimination was codified in the Burden of Proof Directive.[4] A few years later it was again redefined in Directive 2002/73/EC (amending the Equal Treatment Directive 76/207/EEC).[5] The latter step was deemed necessary because, in 2000, the two other anti-discrimination directives were adopted, on the basis of Article 13 EC Treaty. These two directives contained a new definition of indirect discrimination. It was believed that, for reasons of consistency, the definition in the field of sex discrimination should be the same as that in the new directives. An important result of these codifying operations is that in all the areas concerned, there is a more or less uniform definition of indirect discrimination, since the definition used by the two Article 13 directives is based on the concept as it has been defined by the ECJ in the area of discrimination on grounds of nationality, for instance, in the *O'Flynn* case.[6]

The existence of an umbilical cord connecting the different instruments to combat discrimination and enhance equality in all the areas covered at this moment by EU law – race, ethnic origin, religion or belief, disability, age, sexual orientation and arguably to a certain extent also nationality – was recently underlined in the case of *Ma-*

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1 Cf. M. Bell *Anti-Discrimination Law and the European Union* Oxford 2002 or E. Ellis *EU-Anti-Discrimination Law* Oxford 2005.

2 Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, p. 22 and Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16. For some not entirely clear reasons, in certain circles the somewhat peculiar distinction has been introduced between EU anti-discrimination law, referring to these directives, and EU equality law, which refers, in particular, to equality between women and men. Indeed, this might suggest that equality law is not about discrimination and vice versa, which is obviously very unfortunate as both notions are closely linked.

3 Cf. C. Tobler, *Remedies and Sanctions in EC non-discrimination law* Luxembourg, European Commission 2005.

4 Directive 97/80/EC, OJ L 14, 20.1.1998, p. 6.

5 Directive 2002/73/EC, OJ L 269, 5.10.2002, p. 15.

6 Case C-237/94 *O'Flynn* [1996] ECR I-2617.

ruko.[7] This case concerned the payment of a survivor's benefit to a same-sex partner after the death of his life companion. The ECJ had to decide, *inter alia*, whether Directive 2000/78/EC applied. For that purpose, it had to be established whether the survivor's benefit was paid under an occupational pension covered by the Directive or whether it was to be considered as a benefit under a statutory social security scheme, to which the Directive did not apply.

Aided by a discrete reference to Article 141 EC Treaty, which provides for equal pay and equal treatment of women and men, the ECJ applied its well-established case law on pensions discrimination *based on gender* to the case at hand: an issue of discrimination on grounds of *sexual orientation*. In other words, the question of what is an occupational scheme and what constitutes a statutory scheme is to be tackled along the same lines under EU gender discrimination law and the more general directive covering discrimination on grounds of religion or belief, disability, age and sexual orientation.

The relationship between gender equality law and non-discrimination on other grounds has already received considerable attention in the past and will undoubtedly attract even more attention in the future, not least because it would be bizarre to treat non-discrimination and gender equality as two separate worlds. However, what is perhaps less well known is the influence of certain features of gender equality law on various aspects of Community law in general. It has affected, in a remarkable way, several general tenets underlying all of Community law, whether dealing with free movement of workers, taxation, competition or consumer protection, just to mention a few areas. This influence is the central theme of the present article, which I will discuss while using, as far as possible, concrete cases as examples. The examples are grouped in three different sections. In the final section I will briefly suggest a number of explanations as to why it was in gender equality cases that these important developments took place.

Can individuals rely on EU law in the courts?

The direct effect of EC law,[8] as developed by the ECJ from the early 1960s, makes it possible for individuals to rely directly on EC law provisions in national courts in order to have the rights they derive from EC law protected. One of the issues that are still disputed, to an extent, is the question of how far EC law provisions can be relied upon in national courts against a private party, such as an employer, with horizontal direct effect.

Defrenne II[9] is one of the well-known cases. It concerned a Belgian stewardess claiming equal pay on the basis of Article 119 (now 141) of the EC Treaty. Although that Article imposes an obligation upon the Member States, namely to ensure the application of the equal pay principle, and despite the fact that the Article uses the term 'principle', the ECJ decided, in 1976, that that Article had horizontal direct effect, i.e. that it can be relied upon in national courts against a private employer. So, in this respect at least, there is clarity. In other respects, however, the issue of horizontal effect is still hotly debated.

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7 Case C-267/06 *Tadao Maruko* judgment of the ECJ of 1 April 2008.

8 EC law is a part of the broader category of EU law. It has certain specific characteristics. Direct effect is one of them.

9 Case 43/75 *Defrenne* [1976] ECR 455.

First, there are, for instance, the recently decided cases of *Viking* and *Laval.*[10] One of the central questions in these cases was whether Articles 43 and 49 (establishment and services) of the EC Treaty can be relied upon against industrial action by trade unions.

AG Poiares Maduro needed four pages to argue that there was horizontal direct effect. This was in spite of the fact that the text of the Articles contained obligations for Member States only. Both the Advocate General and the ECJ relied to some extent on *Defrenne II*. In particular the ECJ pointed out that all agreements intended to regulate paid labour collectively must observe mandatory provisions laid down in the Treaty.

Second, what does it mean when a provision is labelled as a 'principle'? In *Defrenne II*, the UK Government argued that the very use of the word 'principle' in Article 119 indicated that it was concerned with a concept of a very general nature. It could not be relied upon before the courts as it would first need further implementation. The ECJ disagreed and stressed that the term 'principle' underlines the fundamental character of the provisions at issue.

In the Charter of Fundamental Rights of the European Union,[11] Article 52(5) provides for the very limited justiciability of 'principles', excluding full direct effect. The Charter will become binding by virtue of Article 6 of the EU Treaty as amended by the Lisbon Treaty and will have the same legal value as the new EU Treaty and the Treaty on the Functioning of the EU (the 'old' EC Treaty, as amended by the Treaty of Lisbon). (This all depends, of course, on the Lisbon Treaty entering into force).

However this may be, we learn from *Defrenne II* that the label 'principle' is by no means decisive for issues of justiciability. The actual terms of the provision at issue are what matters when questions as to direct effect have to be answered.[12]

Another well-known problem of the invocability of a EC law provision before the national courts is the very fact that directives do not have horizontal direct effect. This in contrast to Article 119(141) of the EC Treaty. In other words, one cannot rely on a directive against a private employer.[13] This is indeed problematic since almost all EU gender equality law is laid down in directives. What can be done to compensate for the lack of horizontal direct effect of directives?

In *Von Colson & Kamann* and the parallel case of *Dorith Harz* – both sex discrimination cases[14] – the ECJ started to develop the doctrine, or the obligation, of interpretation of national law in conformity with the directive at issue. This technique also applies in disputes between individuals.

In the years that followed, this obligation was further refined and it is still one of the mechanisms used to remedy, as far as possible, the lack of horizontal direct effect of directives. A good example is the *Pfeiffer* case,[15] decided in 2004, 20 years after *Von Colson* and concerning the Working Time Directive.

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[10] Case C-438/05 *Viking* judgment of 11 December 2007, not yet reported in ECR, and Case C-341/05 *Laval* judgment of 18 December 2007, not yet reported in ECR.

[11] OJ C 303, 14.12.2007, p. 1.

[12] See S. Koukoulis-Spiliotopoulos 'The Lisbon Treaty and the Charter of Fundamental Rights: maintaining and developing the *acquis* in gender equality' in this volume of *EGELR*, pp. 15-24.

[13] Also this was decided in a sex discrimination case, namely Case 52/84 *Marshall I* [1986] ECR 723.

[14] Case 14/83 *Von Colson* [1984] ECR 1891 and Case 79/83 *Harz* [1984] ECR 1921. See further also below.

[15] Joined Cases C–397/01 to C–403/01 *Pfeiffer* [2004] ECR I-8835.

The obligation of consistent interpretation has also been used to tone down the consequences of the explicit denial of the direct effect of *framework decisions*, an important category of instruments in the Third Pillar (see the *Pupino* case).[16]

Deterrent sanctions, effective judicial protection

The *Von Colson & Kamann* case concerned a refusal to consider the candidature of a job applicant on grounds of sex. According to German law she could only be reimbursed with the expenses incurred in connection with the application (stamps and paper). In this case the ECJ found that, although the Equal Treatment Directive did not require any specific form of sanction for unlawful discrimination, the sanction must nevertheless be adequate in relation to the damage sustained; it must be effective and it must have a deterrent effect on the employer.

The Court relied in this case on the purpose of the Equal Treatment Directive[17] and on Article 6 which provided that alleged victims of discrimination must be able to pursue their claims by judicial process, and construed the requirement that Member States must provide for *an* appropriate system of sanctions.

Since then, the Court has transposed these requirements to other fields of Community law. In Case 68/88 (*Commission* v *Greece – Greek Maize*),[18] which concerned agricultural fraud, the Court held that although the choice of penalties remains within the discretion of Member States, they must nevertheless ensure that the sanctions for breaches of the respective regulations are effective, proportionate and dissuasive.

Ever since *Greek Maize*, these requirements have become a general standard for every sanction under Community law, both in case law and to an increasing extent in EU legislation, the Third (criminal law) Pillar included.

In the *Marguerite Johnston* case,[19] the ECJ identified effective judicial protection as a general principle of Community law. The case concerned, *inter alia*, an evidential rule in the Northern Ireland sex discrimination legislation that deprived the national court of the power to decide an issue arising in relation to the Equal Treatment Directive. The Court of Justice found that the requirement of effective judicial control, stipulated in Article 6 of the Equal Treatment Directive, reflects a general principle of law, which underlies the constitutional traditions common to the Member States and which is also laid down in the European Convention on Human Rights. The ECJ found that the evidential rule at issue was not compatible with this newly discovered principle of effective judicial protection.

Effective judicial protection started in sex discrimination law but was soon exported to other areas of Community law, such as the free movement of workers (the *Heylens* case),[20] freedom of establishment (the *Vlassopoulou* case),[21] competition law, and many other areas. EC law regarding liability for breaches of EC law, decided in *Francovich*,[22] is also partly based on the principle of effective judicial protection. Moreover, it is also relied upon and applied in the 'terrorism cases'.[23] At the end of the day, it was codified in the Charter of Fundamental Rights of the EU, in Article 47.

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16 Case C-105/03 *Pupino* [2005] ECR I-5285.
17 Directive 76/207/EEC, OJ L 39, 14.2.1976, p. 40.
18 Case 68/88 *Commission* v *Greece* [1989] ECR 2965.
19 Case 222/84 *Johnston* [1986] ECR 1651.
20 Case 222/86 *Heylens* [1987] ECR 4097.
21 Case C–340/89 *Vlassopoulou* [1991] ECR I–2357.
22 Joined Cases C–6/90 and C–9/90 *Francovich* [1991] ECR I–5357.
23 Case C-355/04P *Segi* [2007] ECR I-1657.

Is this expansion of 'effective judicial protection' surprising? Not really – the principle is relevant in any area of Community law since it is a general principle. However, the fact remains that it was discovered in a sex discrimination case.

Time-limits

While direct effect and consistent interpretation may greatly help alleged victims of discrimination to defend their rights in national courts, there still remains the problem of national procedural law that applies to these actions including national rules regarding time-limits which may bar the proceedings.

The *Theresa Emmott* case [24]concerned equal treatment of men and woman in social security. Ms Emmott had applied for a social security benefit but she was continually told to wait since EC law was not yet clear. There was another case still pending before ECJ. There was also evidence of dissuasive correspondence and of the applicant being misled. Eventually, Ms Emmott started judicial proceedings and then she was told that she was too late. She was told that the three-month time-limit for bringing an action for judicial review under Irish law had expired.

According to the well-established case law of the ECJ, in the absence of Community rules on the subject, it is for the domestic legal system of each Member State to determine the procedural conditions governing actions at law intended to ensure the protection of an individual's Community law-based rights.

Until this case, only two minimum requirements had been imposed by the ECJ in this respect, first that the national rules of procedure must not make it impossible in practice to exercise such rights, and second, that the national rules of procedure may not be less favourable than those governing the same right of action on an internal matter. According to the Court, the laying down of reasonable time-limits which may bar proceedings satisfied those requirements.

In *Emmott* the Court departed from this established case law and found that as long as a Member State had not properly transposed a directive, the national authorities may not rely on an individual's delay in initiating proceedings. In other words, the national time-limits only begin to run after a proper implementation of a directive.

The dicta of the judgment in *Emmott* were very general and had, potentially, much broader effects. There was also a considerable risk of disrupting various temporal restrictions every time a claim was based on an incorrectly transposed directive, or one that had not been transposed at all. This had detrimental consequences for legal certainty and, in many cases, also a considerable financial impact.

In a line of subsequent cases, which mainly concerned taxation, the ECJ narrowed the broad approach taken in *Emmott*. However, one important element remained: obstruction – reproachable or deliberately misleading behaviour on the part of public authorities or even private defendants – may result in the non-application of time-limits at issue.[25]

Why gender equality cases?

The brief discussion above illustrates an interventionist approach by the ECJ towards national procedural standards and enforcement issues. The ECJ dealt with the prob-

[24] Case C–208/90 *Emmott* [1991] ECR I–4269.

[25] See for instance Case C–231/96 *Edis* [1998] ECR I–4951 and Case C–326/96 *Levez* [1998] ECR I–7835.

lems referred to it in a creative and imaginative manner. In the equal treatment cases, it laid the basis for the further development of notions, rules and doctrines that spread out over all the other domains of European law.

Why was sex discrimination such a 'fertile ground' for these rather far-reaching decisions?

I do not pretend to know the answer, which – certainly – will be a complex one. However, let me mention a few aspects that seem relevant in this respect.

Partly, it is a matter of sheer coincidence: the 'right' case reached the ECJ via the preliminary reference procedure at the right moment. *Von Colson*, for instance, was a German case. The agent representing the German Government argued in favour of consistent interpretation, drawing inspiration from national law, in particular the v*erfassungskonforme Auslegung* (interpretation in conformity with the Constitution). It can be argued that if it had been, for instance, an English case, the outcome might have been different.

There is also a more technical reason that we can point to. A requirement of effective judicial protection was laid down in the relevant directive, the already-quoted Article 6. In the past, it was less usual to lay down provisions on judicial protection in EC legislation than it is nowadays. This Article enabled the Court to use these provisions as a stepping-stone for the development of more general principles of Community law, which could be applied more broadly, even when there was no similar written Community law provision that could apply.

Non-compliance by the Member States with Treaty provisions, in particular Article 119, might have been another factor. The Member States did not safeguard equal pay in the past (and many of them still do not do so convincingly now). In a resolution in 1961, the Member States even tried to delay the implementation of the principle, with the tacit approval of the Commission, which was also very hesitant in bringing infringement proceedings.

How was this poor compliance record to the remedied? There was an effort to implement equal pay through the enactment of Community legislation (the Equal Pay Directive 1975, i.e. 14 years later!), and to impose on the Member States a positive obligation to introduce equal pay legislation. There was, however, also another avenue: direct effect. In other words, one could use the role of 'vigilant individuals' in the enforcement of Community law, an effective instrument ever since the judgment in *Van Gend & Loos*.[26]

Another area of extremely poor performance was the failure of correct and timely implementation of the Social Security Directive relating to statutory schemes. That was in particular the case in the UK, Ireland and the Netherlands.

A closer look at the situation in the Member States as far as the implementation was concerned and the way they reacted to judgments of the ECJ left spectators with a sneaking feeling that the Member States deliberately did not fully implement the Directive, since it was cheaper to wait for individual cases and to rely on national time-limits to stop the actions. One may only speculate how far this was a tacit factor behind the decision in *Emmott*.

An important factor in the dynamic development of equality law was certainly the relentless use of Community sex equality law by certain actors, such as institutional litigants and a few very active and dedicated individuals who brought test cases, generated preliminary references, and supported private litigants in one way or another.

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[26] Case 26/62 *Van Gend & Loos* [1963] ECR 1.

As to the official equality bodies, the two Equal Opportunities Commissions in the UK must be mentioned. In the Netherlands, the 'Ombudswoman', a semi-private body, was behind a whole line of social security cases. In the Netherlands, a test case fund is still operative.

As far as individual persons are concerned in this context, a small group of practising lawyers (*Rechtsanwälte*) in Hamburg should be mentioned, and one or two individual lawyers in Paris and Athens. And last but not least, Éliane Vogel-Polsky, who fought the *Defrenne* cases.

Finally, there is the ECJ. Indeed, we may speculate about individual judges and about the contribution of individual Advocates General in this area. There is little doubt that some of them have a considerable 'feeling' for constitutional law, fundamental rights and labour law issues. Their extra-judicial writings may reveal something of this. In any case, the ECJ, taken as a whole and in contrast to some national courts, took equality rights seriously. The result is a broadly applicable legacy, one which has had effects far beyond gender equality law.

The Lisbon Treaty and the Charter of Fundamental Rights: maintaining and developing the *acquis* in gender equality*

*Sophia Koukoulis-Spiliotopoulos***

1. Introduction

Fundamental rights are a cornerstone of the Union, according to Article 6(1) of the Treaty of the EU (TEU) currently in force. They rank higher than secondary Union law, including directives and regulations, and as high as the Treaties,[1] which, according to the ECJ, constitute '*the Constitutional Charter'* of the Union.[2] They thus form a body of supreme rules, which are binding on the institutions of the Union and on the Member States and can be invoked by individuals before the courts. Gender equality and related rights are fundamental rights.[3] Therefore, in order to grasp their nature and status we must place them within the broader context of fundamental rights.

A first 'Convention'[4] elaborated a Charter of Fundamental Rights of the Union, which was meant to ensure greater '*visibility*' for 'existing' fundamental rights, in order to '*strengthen their protection*',[5] i.e. to codify them, without blocking their evolution. This Charter was an important step in that direction. In several fields, it reflects 'existing' rights and even achieves advances. In certain other fields it falls short of 'existing' rights, without, however, being capable to affect them.

This Charter, *inter alia*, prohibits discrimination on any ground, including sex (Article 21); it recognizes the right to gender equality in all areas and the necessity of positive action for its promotion (Article 23); and it proclaims rights related to family protection and gender equality (Article 33).

The EP, the Council and the Commission 'solemnly proclaimed' at Nice, on 7 December 2000, the above Charter[6] ('the Nice Charter'). This non-binding Charter is mentioned in the Preamble of secondary Union law instruments. Moreover, Advocate Generals, while recalling that it is not legally binding, invoke the Nice Charter acces-

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* This paper draws on the author's papers: 'Towards a European Constitution: does the Charter of Fundamental Rights "maintain in full" the *acquis communautaire*?' *ERPL* 14 No 1 (2002) pp. 57-104; 'Incorporating the Charter in the Constitutional Treaty: what Future for Fundamental Rights?', in: *Problèmes d'Interprétation, à la Mémoire de C.N. Kakouris* pp. 223-258 Athens & Brussels, Sakkoulas & Bruylant 2004, and 'La garantie constitutionnelle des droits fondamentaux dans l'UE et leur avenir: exemples et interrogations par rapport à la Charte', *Annuaire international des droits de l'homme* vol. II (2007) pp. 181-226.

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1 AG Chr. Stix-Hackl, reviewing ECJ case-law in her Opinion in Case 36/02 *Omega Spielhallen- und Automatenaufstellungs GmbH* v *Oberbürgermeisterin der Bundesstadt Bonn.*

2 Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339; *Opinion* 1/91 [1991] ECR I-6079.

3 Case C-50/96 *Deutsche Telekom AG* v *L. Schröder* [2000] ECR I-774, paras. 56-58, and AG G. Cosmas, para. 80.

4 This Convention was convened and mandated by the Cologne European Council of 3-4 June 1999 (Presidency Conclusions). Its composition was similar to that of the European Convention which elaborated the Constitutional Treaty (representatives of the Heads of State or Government of Member States, a representative of the European Commission (Commission) and representatives of the European Parliament (EP) and national Parliaments). http://ec.europa.eu/justice_home/unit/charte/en/links.html, accessed 5 May 2008.

5 Cologne European Council, 3-4 June 1999, Presidency Conclusions; Charter's Preamble.

6 OJ C 364, 18.12.2000, p. 1.

sorily, when it reflects existing rights. The Court of First Instance (CFI)[7] and more recently the European Court of Justice (ECJ)[8] also refer to it in a similar vein.

The 2004 Intergovernmental Conference (IGC) incorporated in the Constitutional Treaty (CT) an amended version of the Nice Charter (the amended Charter). The European Network of Legal Experts in the field of Gender Equality (Network) had warned that the amendments, in conjunction with other shortcomings already present in the Nice Charter, might lead to dangerous confusion regarding the Charter's rights, including gender equality. The Network stressed the primacy of the Community/Union *acquis,* namely of the fundamental rights already guaranteed by the Treaties, secondary law, as well as 'general principles', i.e. binding rules that the ECJ draws from the common constitutional traditions of the Member States and international human rights treaties ratified by them. It also demanded that gender equality be listed among the Union's *values* proclaimed in Article 2 TC.[9] The latter was finally accepted;[10] however, most of the shortcomings put forward by the Network remained.

The Brussels European Council of 21-22 June 2007, confirming the abandonment of the 'constitutional concept', mandated a new IGC to draft a 'Reform Treaty'. The TEU should keep its name, while the TEC should be named 'Treaty on the Functioning of the EU' (TFEU). These Treaties 'will not have a constitutional character', this being reflected in their terminology.[11]

The Reform Treaty, signed at Lisbon, on 13 December 2007 (the Lisbon Treaty, LT),[12] provides that the Union shall have a single legal personality, it shall be founded on the two amended Treaties, which shall have 'the same legal value', and shall succeed the EC, the three 'pillars' being merged (new Articles 1(3) and 47 TEU, Article 1(2) TFEU). In order to come into force, the LT must be ratified by all Member States (current Article 52 TEU).

The amended Charter was 'solemnly proclaimed' by the EP, the Council and the Commission at Strasbourg, on 12 December 2007, and published in the Union's Official Journal[13] together with its 'explanations';[14] it was not incorporated in the LT.

This paper attempts to explore briefly the amended Charter's status under the LT as well as some problems of legal uncertainty regarding the scope and effects of this Charter in general, and in particular of gender equality and related rights which it proclaims; it also suggests ways to overcome them by using the potential of the LT and of this Charter, in light of the Community/Union *acquis.*

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7 E.g. Cases T-177/01 *Jégo-Quéré & Co* v *Commission* [2002] ECR II-2365, paras. 41, 42, 47; T-211/02 *Tideland Signal Ltd* v *Commission* [2002] ECR II-3781.

8 Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769.

9 Last Network's paper 'The European Constitution and Gender Equality: Observations on the Draft Treaty establishing a Constitution for Europe', September 2003, in *Bulletin on Legal Issues in Equality* No 3/2003 http://ec.europa.eu/employment_social/gender_equality/legislation/bulletin_en.html, accessed 5 May 2008.

10 Not by the European Convention, but by the IGC 2004 under the Irish Presidency.

11 Brussels European Council 21-22.06.2007, Presidency Conclusions, Annex I.

12 OJ C 306, 17.12.2007, p. 1. Consolidated Treaties: http://www.consilium.europa.eu/uedocs/cmsUpload/st06655.en08.pdf, accessed 05 May 2008.

13 OJ C 303, 14.12.2007, p. 1.

14 Explanations for each Charter Article were drafted by the Praesidium of the first Convention and updated by the Praesidum of the European Convention (*infra* 2, 3.1, 3.4).

2. The Charter's status under the Lisbon Treaty

Article 6(1) TEU (new) reads:

> 1. 'The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have *the same legal value as the Treaties*.
> The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
> The rights, freedoms and principles in the Charter shall be *interpreted* in accordance with the *general provisions* in Title VII of the Charter governing its interpretation and application and with *due regard* to the *explanations* referred to in the Charter, that set out the *sources* of those provisions.'[15]
> 2. 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.'
> 3. 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

Thus the amended Charter is granted Treaty status. A Protocol annexed to the Treaties provides an opting-out for the UK and Poland regarding the Charter's application. However, in accordance with well-established ECJ requirements (*infra* 3.3), these Member States shall still inevitably be bound by fundamental rights, including 'existing' rights enshrined in the Charter and any other rights which are or will be recognized by 'written' Union law or EJ case-law, when they act within the scope of Union law, whichever Treaty may be in force.

3. The amendments to the Charter: unsuccessful attempts to limit its scope and effects

3.1. The additions to the Preamble and the modifications of the general provisions

New Article 6(1) TEU concerns the amended Charter, not the Nice Charter. What is the difference between the two and how much does it matter?

The European Convention, which elaborated the CT, and the 2004 IGC made the following amendments to the Nice Charter:

1. an addition to the Preamble: 'the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter, and updated under the responsibility of the Praesidium of the European Convention'; and
2. modifications of Title VII, starting with its title, which was 'General provisions' and became: 'General provisions *governing the interpretation and application of the Charter'*.

[15] Emphasis added.

These amendments highlight the aim of the whole exercise: to condition the Charter's judicial interpretation with a view to limiting its scope and effects.

This results more specifically from the amendments to Article 52, namely:

a. the modification of its title, which was 'Scope of guaranteed rights' and became 'Scope *and interpretation* of rights *and principles'*;[16]
b. the amendment of paragraph 2 and the addition of four paragraphs (4th, 5th, 6th and 7th).

3.2. The attempt to undervalue the 'principles'

The most controversial amendment is the addition of a 5th paragraph to Article 52:[17]

> 'The provisions of this Charter which contain *principles may* be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States *when they are implementing* Union law, in the exercise of their respective powers**.** *They shall be judicially cognizable only* in the interpretation of such acts and in the ruling on their legality.'[18]

This new paragraph seeks to exclude the direct effect of 'principles' and to limit their invocability, i.e. the possibility to rely on them before courts and other national authorities; to leave their implementation to the discretion of the legislative and administrative authorities of the Union and Member States; and to prevent Union and national courts from taking them into account, unless and insofar as these authorities have implemented them. By reducing the invocability of 'principles', the new paragraph also seeks to restrict the fundamental right of access to court, which Charter Article 47 proclaims in accordance with the Union *acquis*.

However, the effect of each provision of Union law is a matter for the ECJ; it cannot be determined *a priori* in a general and absolute way. The ECJ deduces enforceable rights from provisions referring to 'rights' or to 'principles' or to none of these notions, and irrespective of whether they are addressed to the Community or to Member States. Typical examples are the fundamental freedoms which, although appearing as mandates for action by Community institutions and/or imperatives or prohibitions for Member States, are increasingly seen by the ECJ as being 'directly applicable and prohibiting all infringements'.[19] This is true, e.g., for Articles 43 (ex 52)[20] and 49 (ex 59)[21] TEC (prohibition of restrictions of freedom of establishment and

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16 Emphasis added to the amendments.

17 See J. Dutheil de la Rochère 'The EU and the individual: fundamental rights in the draft Constitutional Treaty' *CML Rev.* 2004 pp. 345-354; G. Braibant 'Conclusions', *EPLR* 2004 pp. 333-336; D. Triantafyllou *La Constitution européenne selon le Traité de Rome de 2004* Brussels, Bruylant 2004, pp. 63-67; S. Prechal 'Rights v. Principles or how to remove fundamental rights from the jurisdiction of the courts' in: *Liber Amicorum A. Kellermann. The EU: an ongoing process of integration* pp. 1-8 The Hague, Asser Institute 2004; D. Martin *Égalité et non-discrimination dans la jurisprudence communautaire* Brussels*,* Bruylant 2006, pp. 213-214.

18 Emphasis added.

19 V. Skouris 'Fundamental Rights and Fundamental Freedoms: The Challenge of Striking a Delicate Balance' *Sir Thomas More Lecture*, Lincoln's Inn London 2005, pp. 227-228.

20 Cases 2/74 *Reyners* v *Belgian State* [1974] ECR 631, para. 32; C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651, paras. 21-22.

21 Case 36/74 *Warlave and Koch* v *Association Union Cycliste Internationale e.a.* [1974] ECR 1420, para. 34.

provision of services, respectively); or Article 39 (ex 48) (obligation to secure free movement of workers and abolish any discrimination based on their nationality).[22]

Furthermore, the ECJ, recognizing the direct effect of Article 119 (now 141) TEC (equal pay for men and women), which is addressed to Member States, explicitely stressed that 'in the language of the Treaty [the term '*principle*'] is specifically used in order to indicate the fundamental nature of certain provisions'. 'If this concept were to be attenuated to the point of reducing it to the level of a vague declaration, the very foundations of the Community (…) would be indirectly affected'.[23]

Therefore, to the extent that they fulfill the criteria established by the ECJ (precision, unconditionality, no need for further Community or national action), Community provisions constitute legal rules that confer individual rights whose protection national courts must ensure. These criteria have gradually become more flexible, so as to favour direct effect. Thus, the ECJ has accepted that a rule may be clarified by means of judicial interpretation; and direct effect is only postponed until an eventual condition is fulfilled or an eventual deadline has expired, irrespective of whether the required Community or national action is taken.[24] Moreover, the mere fact that a Treaty provision requires implementing measures does not exclude its direct effect.[25] The same shall apply to the Charter's provisions.

The ECJ constantly 'stretches' the concept of direct effect[26] – a fundamental feature of Community law and a corollary to its primacy[27] – so that '[it] may now be regarded as the norm rather than the exception'.[28] Indeed, hardly any Community provision does not have some kind of direct effect, in the sense that individuals may rely on it and national authorities must apply it, while non-observance of either a 'principle' or a 'general principle' is an infringement of Community law.[29] Moreover, 'invocability'[30] of Union law (in the sense of requiring consistent interpretation of national law) goes beyond the first pillar.[31]

In upholding the direct effect or invocability of Community/Union law provisions, the ECJ makes no distinction between '*social'* and other provisions. Typical examples: the direct effect of Article 141 (ex 119) EC, which, as the ECJ recalled 'forms part of the social objectives of the Community' and is inserted 'into the body of a chapter devoted to social policy',[32] and of provisions of gender equality directives. Thus, the distinction between 'social' and other rights is meaningless under Union law.

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22 Cases 41/74 *Van Duyn* v *Home Office* [1974] ECR 1337, paras. 5-8; C-415/93 *Union royale belge des sociétés de football association e.a* v *Bosman* [1995] ECR I-4921, paras. 82, 129; C-424/97 *Haim* [2000] ECR I-5123, paras. 45, 57.

23 Case 43/75 *Defrenne* v *Sabena (Defrenne II)* [1976] ECR 455.

24 *Defrenne II*; Case C-262/88 *Barber* [1990] ECR I-1889.

25 *Reyners* (Article 43 (ex 52) EC became directly effective before the directives provided for its implementation by Articles 44 (x 54) and 47 (ex 57) EC were adopted).

26 S. Prechal 'Does direct effect still matter?' *CML Rev*. 2000*,* pp. 1048-1069.

27 Cases 26/62 *Van Gend & Loos* [1963] ECR. 9; 6/64 *Costa* v *ENEL* [1964] ECR 1145.

28 T. Hartley *The Foundations of European Community Law* New York, Oxford University Press 2007, p. 197.

29 Case C-187/98 *Commission* v *Greece* [1999] ECR I-7713 (principle of equal pay); Case 249/86 *Commission* v *Germany* [1989] ECR 1263 (general principle of respect for family life).

30 See Y. Galmot & J.-C. Bonichot 'La Cour de Justice des CE et la transposition des directives en droit national', *RFDA* 1988 pp. 1-23; P. Manin 'L'invocabilité des directives: quelques interrogations', *RTDE* 1990 pp. 670-693.

31 Case C-105/03 *Pupino* [2005] ECR I-5285 (third pillar).

32 *Defrenne II,* paras. 10-11.

3.3. The attempt to limit Member States' obligation to respect the Charter's rights

According to abovementioned new paragraph 5 of Article 52, national authorities may implement the principles '*when they are implementing Union law*'. This is an implicit reference to Article 51(1) of the Nice Charter, which reads: '*The provisions of this Charter are addressed (...) to the Member States only when they are implementing Union law*'. It may thus be thought that Member States must respect the Charter's rights only in transposing provisions of directives or taking other measures aimed at complying with Union provisions. However, according to ECJ case-law, the Member States' obligation is much wider: they must respect fundamental rights not only in such cases, but also, more generally, whenever they act '*within the scope*' of Union law' (Skouris 2005, p. 231). This wider obligation is recalled, with refence to ECJ case-law, by the (non-amended) 'explanation' of Article 51, and by an excellent working paper of the secretariat of the European Convention's Working Group 'Charter'.[33] Thus, e.g. Member States must respect fundamental rights when they make use of an exception allowed by the Treaty to its provisions, even where no national implementing measure is at stake.[34]

It is within the above context that both the Nice and the amended Charter must be read.

3.4. Other additions to Article 52

The other new paragraphs of Article 52 read:

> 4. 'Insofar as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.'
> 6. 'Full account shall be taken of national laws and practices as specified in this Charter.'
> 7. 'The explanations drawn up as a way of providing guidance in the interpretation of the Charter shall be given due regard by the courts of the Union and of the Member States.'

Common constitutional traditions are a source of inspiration for the ECJ, which deduces from them general principles and defines their scope, without applying 'the minimum common denominator'; 'it may choose the highest standard, even deriving from one Constitution'.[35] This is not a task for national courts, which must apply general principles as formulated by the ECJ and interpret national law in accordance with Union law, including ECJ case-law, not vice-versa, giving precedence to national law only to the extent that it is more favourable to fundamental rigts (*infra* 4). Thus, new paragraphs 4 and 6 of Article 52 are meaningless, but they may create confusion regarding the hierarchy of norms and the division of competences between the ECJ and national courts.

New paragraph 7 repeats the addition to the Preamble (*supra* 3.1). However, the 'explanations' are *not* an authentic interpretation of the Charter. This results clearly

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[33] CONV 116/02, http://european-convention.eu.int/searchDocs.asp?lang=EN&SortOrder=SREL&searchterm=CONV%20116/02&doctype=DOC, accessed 5 May 2008.

[34] Cases C-260/89 *ERT* v *DEP* [1991] ECR I-2925; C-94/00 *Roquette Frères* v *Directeur général de la concurrence, de la consommation et de la répression de fraudes* [2002] ECR I-9001; *Steffensen* [2003] ECR I-3735.

[35] V. Skouris addressing the Convention's working Group 'Charter', Working Document 19, http://european-convention.eu.int, accessed 5 May 2008.

from Article 6(1) TEU, which mentions them as mere references to '*sources'* of Charter provisions and leaves their use to the courts' discretion ('*due regard'*). Anyway, even where the 'explanations' refer to all the sources, ECJ case-law is already surpassing them, while fundamental rights sources are constantly enriched by new Union or international instruments. Moreover, it must be expected that the ECJ will make the Charter a 'living instrument', as the European Court of Human Rights is doing with the European Convention on Human Rights (ECHR).

The ECJ has no need for 'rules of interpretation'; it determines them itself, by virtue of its mission to '*ensure that the law is observed*' (Article 220 TEU, new Article 19 TEU), and privileges the teleological method. There is, however, a risk of confusion regarding the scope and effects of the Charter, which may restrict national judicial protection.

4. The safety valve

Article 53 ('Level of protection'), which was not amended, reads:

> 'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all Member States are party, including the [ECHR], and by the Member States' constitutions.'

According to its 'explanation', this Article 'is intended to maintain the level of protection currently afforded' by other sources. However, this is not a mere 'standstill' clause. It reflects a principle of international human rights law, expressed in several treaties, including the ECHR (Article 53), according to which the rules more favourable to human rights prevail, whatever their source, the principles of *lex posterior* and *lex specialis* not applying to them.[36] This Article thus concerns both current and future higher standards. It conditions the interpretation and application of the whole Charter, so that its useful effect and the safeguard and development of the *acquis* can be secured.

5. Gender equality

Charter Article 23 reads:

> 'Equality between men and women must be ensured in all areas, including employment, work and pay.
> The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.'

Paragraph 1 of this Article is based on Article 3(2) TEC (new Articles 3(2) TEU and 8 TFEU),[37] which imposes on all Union institutions the positive obligation, in exercising their respective powers, to eliminate gender 'inequalities' and to 'actively promote' substantive gender equality, in all areas.[38] It must be considered that Member

[36] On this principle: E. Roucounas *Engagements parallèles et contradictoires* The Hague, Recueil des Cours de l'Académie de Droit International, vol. 206 (1987-VI) pp. 197-221. Cf. ECJ *Schröder*.
[37] See the Article's 'explanation'.
[38] AG Chr. Stix-Hackl, Case C-186/01 *Dory* v *Federal Republic of Germany* [2003] ECR I-2479.

States are also bound by this obligation *via* their duty of 'sincere cooperation' (Article 10 TEC, new Article 4(3) TEU). The concept of 'inequality' is different in nature from and broader than the concept of 'discrimination'. It covers *de facto* situations affecting mainly women, due to 'prejudices and stereotypes' which infiltrate socio-economic structures. Inequalities survive the repeal of discriminatory provisions. Moreover, women are neither a group nor a minority, but one of the two forms of the human being and half of mankind, and they often suffer multiple inequalities. This is why gender equality is a Union positive and pro-active constitutional principle, horizontal objective and fundamental right – not a mere prohibition of discrimination – positive action being its logical corollary.[39]

Article 2 (new) TEU[40] proclaims the Union's fundamental values. Reflecting the nature and importance of gender equality, it includes it, besides 'non-discrimination', in its second sentence, which is a particular expression of its first sentence. Thus, gender equality will, *inter alia*, be a yardstick for determining whether a Member State is in breach of the 'values' and, therefore, liable to a sanction, in accordance with Article 7 TEU, as well as for determining whether a European State can be a candidate for accession, in accordance with Article 49 TEU.[41] This is also nowadays the case under current Articles 6(1), 7 and 49 TEU, since gender equality is a fundamental right.

Declaration No 19 annexed to the Final Act of the 2007 IGC confirms that *domestic violence* is a gender equality issue and that it is the Union's and Member States' obligation to combat it in all areas. Thus, instruments implementing Article 10 TFEU (currently 13 TEC) in respect of gender equality will have a clear legal basis in order to deal with domestic violence.

Article 23(1) of the Charter is worded like Article 141(1) TEC; it thus confers a fundamental right. The reference, in paragraph 2, to equality as a 'principle' makes no difference; on the contrary, it strengthens it (*supra* 3.2). Paragraph 2, although inspired by Article 141(4) TEC,[42] omits the first part of this provision ('*with a view to ensuring full equality in practice between men and women (...)'*) which indicates that positive measures are means to promote substantive equality – not exceptions – as well as its last part (*'(...) or preventing or compensating for disadvantages'*) which indicates the width of the scope of positive measures. These omissions cannot affect the well-established nature and scope of positive action, but may create confusion.

6. Reconciling family and work: a natural corollary to gender equality

Charter Article 33 reads:

> 'The family shall enjoy legal, economic and social protection.
> To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.'

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[39] Cf. Cases C-158/97 *Badeck* v *Hessischer Ministerpräsident* [2000] ECR I-1875; C-409/95 *Marschall* v *Land Nordrhein-Westfalen* [1997] ECR I-6363. See S. Koukoulis-Spiliotopoulos 'The amended equal treatment directive (2002/73): an expression of constitutional principles/fundamental rights' 12 *MJ* 4 2005 pp. 327-369.

[40] 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

[41] New Articles 7 and 49 TEU refer to Article 2 TEU *as a whole*.

[42] See its explanation. Under the LT, Article 141 TEC becomes Article 157 TFUE.

Paragraph 1 reflects the general principle of family protection, a source of fundamental rights of parents and children, drawn by the ECJ from Article 8 ECHR.[43] Reconciliation of family/private life with work, is a particular expression thereof, '*a natural corollary to gender equality'* and a means for its substantive achievement;[44] hence a proactive principle, a '*value*' and a horizontal objective of the Union, in all areas (cf. *supra* 5). Consequently, it is a fundamental social and economic goal of the Lisbon strategy, along with gender equality.[45]

Paragraph 2 guarantees the 'right to paid maternity leave', thus surpassing the *minimum* requirement of Directive 92/85.[46] Otherwise, it does not reflect the width of the reconciliation principle, as expressed in Directives 92/85, 96/34 (parental leave),[47] 2002/73/EC,[48] the 'recast directive'[49] and ECJ case-law. It omits e.g. i) regarding maternity protection, the rights to be hired, to maintain employment rights during pregnancy and maternity leave, to return to the same or an equivalent post and to have health protection and security; and ii) regarding parental protection, the rights not to be dismissed due to the exercise of the right to parental leave, to maintain employment rights during that leave, to return to the same or an equivalent post and to obtain time-off for urgent family reasons. It also omits the prohibition of any unfavourable treatment related to pregnancy, maternity or parenthood enshrined in Directive 2002/73 and the Recast Directive, in conformity with ECJ case-law interpreting Directive 76/207. Therefore, in accordance with Article 53 (*supra* 4), this provision confers further rights, by virtue of its advances, while its shortcomings cannot affect the *acquis* nor prevent its development, although they risk creating confusion.

The 'explanation' omits Directive 76/207 and limits 'maternity' to 'the period from conception to weaning'. However, not all women breastfeed, while breastfeeding may stop before expiry of maternity leave, which is, in any event, included in the period of protection. Therefore, the 'explanation' is of no use in these respects.

Final remarks

Neither the shortcomings of the Nice Charter's provisions nor its amendments, aiming at guiding judicial interpretation in a restrictive way, can affect the *acquis* or prevent its development, but they may create confusion regarding the content, scope and invocability of fundamental rights, which may affect national judicial protection.

Irrespective of whether and when the LT comes in force, the future of fundamental rights will be in the hands of the ECJ, which constantly develops them and effectively ensures their observance by Union institutions and by Member States whenever they act within the scope of Union law, even going '*beyond primary and secondary*

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43 Cases C-482/01 & C-493/01 *Orfanopoulos and others* v *Land Baden-Württemberg* [2004] ECR I-5257; C-60/00 *Carpenter* v *Home Secretary* [2002] ECR I-6279.

44 Cases C-243/95 *Hill and Stapleton* v *the Revenue Commissioners and the Department of Finance* [1998] ECR I-3739; C-1/95 *Gerster* v *Freistaat Bayern* [1997] ECR I-5253.

45 European Commission, Report on Equality between Women and Men – 2008, http://ec.europa.eu/employment_social/emplweb/gender_equality/publications_en.cfm, accessed 5 May 2008.

46 Directive 92/85/EEC OJ L 348, 28.11.1992, p. 1, Article 11(1) and (3): an income at least equivalent to that which the worker would receive in the event of break in her activities on grounds connected with her health.

47 Directive 96/34/EC, OJ L 145, 19.06.1996, p. 4.

48 Directive 2002/73/EC amending Directive 76/207 OJ L 269, 5.10.2002, p. 15.

49 Directive 2006/54/EC (Recast). OJ L 204, 26.7.2006, p. 23.

texts'.[50] However, it is only the tip of the iceberg that reaches the ECJ. It is interested individuals and organizations who keep the rights 'visible', by exercising them and invoking them before courts and other national authorities, thus also giving the ECJ the opportunity to reaffirm and develop them.

[50] V. Skouris addressing the Convention which elaborated the Charter. First meeting of the Body to draw up a draft Charter of Fundamental Rights of the EU (Brussels, 17 December 1999) (CHARTE 4105/00), Annex V.

EU Policy and Legislative Process Update

Period: May 2007 – May 2008

1. On 10 May 2007 the Commission published a communication on promoting solidarity between the generations, in which it stressed the need for improving national family policies in order to achieve a better balance of responsibilities.
http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0244:FIN:EN:PDF, accessed 19 June 2008.

2. On 27 October 2007 an opinion by the European Economic and Social Committee was published on Employability and entrepreneurship – The role of civil society, the social partners and regional and local bodies from a gender perspective.
http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:256:0114:0122:EN:PDF, accessed 19 June 2008.

3. **Reasoned opinions to implement the Employment Equality Directive (2000/78/EC)**

   The Commission sent reasoned opinions to 10 Member States on 31 January 2008 to implement fully the EU rules prohibiting discrimination in employment and occupation on the grounds of religion and belief, age, disability and sexual orientation. One of the aspects which have been incorrectly implemented is that the prohibition on discrimination on grounds of sexual orientation is not guaranteed for public service workers. Although the reasoned opinions concern different grounds of discrimination, gender equality is affected (for example, by the ground of sexual orientation).
   http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/68&format=HTML&aged=0&language=EN&guiLanguage=en, accessed 16 June 2008.
   On 16 June 2008 Jacques Barrot, Vice-President of the European Commission, delivered a speech to the European Parliament, in which he stressed the need for a cross-cutting directive, wherein unequal treatment for all the grounds mentioned in article 13 EC would be prohibited.
   http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/335&format=HTML&aged=0&language=EN&guiLanguage=en, accessed 19 June 2008.

4. On 7 March 2008 Council Decision 2008/203/EC was published in the Official Journal. The Decision implements a Multi-annual Framework for the European Union Agency for Fundamental Rights for 2007-2012. The agency's thematic areas include discrimination based on sex or sexual orientation.
http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:063:0014:01:EN:HTML, accessed 19 June 2008.

5. **Work programme of the Roadmap for equality between women and men adopted**

   On 12 March the Commission adopted the 2008 the work programme for the Services of the European Commission in the light of the Roadmap for equality be-

tween women and men (SEC (2008) 338).[1] The work programme presents actions carried out in 2007 and plans for 2008 in view of realising the Commission's commitment towards equality between women and men in six priority areas: equal economic independence for women and men; reconciliation of private and professional life; equal representation in decision-making; eradication of all forms of gender-based violence; elimination of gender stereotypes; the promotion of gender equality in external and development policies. The document has been transmitted to the Council, the European Parliament, the Committee of the Regions and the European Economic and Social Committee.
http://ec.europa.eu/employment_social/emplweb/news/news_en.cfm?id=376, accessed 18 June 2008.

6. European Institute for Gender Equality in Vilnius (Lithuania)

On 14 March a vacancy was published in the Official Journal for the Director of the European Institute for Gender Equality.
OJ C 69A, 14.3.2008, p. 1-s008 (the application date expired on 22 April 2008).
By a Council decision of 30 May 2007 the members and alternate members of the Management Board of the European Institute for Gender Equality were appointed.
OJ C 128, 9.6.2007, pp. 2-3.

7. Non-legislative resolution of the European Parliament

On 20 May 2008 the European Parliament adopted a resolution on the progress made in equal opportunities and non-discrimination in the EU since the transposition of Directives 2000/43/EC and 2000/78/EC. The European Parliament *inter alia* considers that it is necessary to enlarge the scope of the directives to cover all the areas that fall under Community competence such as education, lifelong learning, social protection, housing and healthcare, images of discriminated groups in the media and advertising, physical access to information for people with disabilities, telecommunications, electronic communication, transport modes and public spaces, social advantages and access to and the supply of goods and services which are available to the public. Furthermore, the Parliament insists on improving awareness concerning the rights under the anti-discrimination Directives and ensuring that victims of discrimination have access to a range of advocacy support. The Parliament recommends that equal treatment and opportunities under employment and social inclusion policies must be ensured by addressing discrimination in recruitment procedures.
http://www.europarl.europa.eu/oeil/file.jsp?id=5531592, accessed 18 June 2008.

8. Launching a network of women in decision-making

On 2 June 2008, female decision-makers from around Europe met for the launch of the newly established 'Network of women in decision-making in politics and the economy'. The group aims to improve gender balance in decision-making positions by providing a platform at the EU level.
http://ec.europa.eu/employment_social/emplweb/news/news_en.cfm?id=409

[1] Programme de travail de la feuille de route pour l'égalité entre les femmes et les hommes (2006-2010), réalisations 2007 et prévisions 2008 (the document is avaible in French)

http://ec.europa.eu/employment_social/gender_equality/docs/2007/opinion_dec_mak_en.pdf, accessed 18 June 2008.

9. Agreement on the Working Time Directive

The Commission strongly welcomed the agreement that Member States reached on 10 June on long-standing issues of the Working Time Directive and the Temporary Agency Work Directive at the Employment and Social Affairs Council in Luxembourg. Equal treatment of temporary agency workers as well as regular workers in terms of pay, maternity leave and leave is one of the important points on which Member States reached an agreement.
http://ec.europa.eu/employment_social/emplweb/news/news_en.cfm?id=413, accessed 18 June 2008.

10. Opinion of the Advisory Committee on equal opportunities for women and men on the revision of Directive 86/613/EEC

On 11 June 2008 an opinion on the revision of Directive 86/613/EEC was delivered by a working group appointed by the Committee. The working group recommends that in EU legislation:

- Assisting spouses are given every possibility to obtain a clear professional status.
- Compulsory registration of assisting spouses is systematically carried out, while respecting the principle of subsidiarity, to ensure social security protection with the possibility of a voluntary opt-out clause.
- Alongside the terms 'wife' and 'marital status', 'unmarried partners living as a couple' and 'same-sex couples' are added.
- Assisting spouses are given every possibility to be covered under existing systems in Member States where compulsory social protection is in place for self-employed workers.
- Financial compensation be made available for the self-employed and their assisting spouses to enable them to find suitable replacement measures for child and dependent person care.
- Provisions for paid maternity/paternity leave be made available to self-employed and assisting spouses, on the same basis as for other employers and employees, according to national laws, practices and traditions.
  http://ec.europa.eu/employment_social/gender_equality/docs/2008/final_opinion_11_06_en.pdf, accessed 18 June 2008.

OTHER RELEVANT PUBLICATIONS

All the following publications were available on the internet on 19 June 2008.

1. On 23 January 2008 the report 'Gender Equality Law in the European Union' was published.
   http://ec.europa.eu/employment_social/publications/2007/ke7807349_en.pdf

2. On 22 February 2008 the Commission published the 'Report on equality between women and men 2008'
   http://ec.europa.eu/employment_social/publications/2008/keaj08001_en.pdf

3. On 22 February 2008 the Commission published a report on 'Women and men in decision-making 2007 – Analysis of the situation and trends'
   http://ec.europa.eu/employment_social/publications/2008/ke8108186_en.pdf

4. On 6 March 2008 Eurostat published a Statistical portrait of 'the life of women and men in Europe'.
   http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-80-07-135/EN/KS-80-07-135-EN.PDF

European Court of Justice Case Law Update

May 2007 – May 2008

ECJ, 21 June 2007, joined cases C-231/06, C-232/06 and C-233/06,
***Office national des pensions* v *Emilienne Jonkman and Hélène Vercheval and Noëlle Permesaen* v *Office national des pensions* [2007] ECR I-5149**
Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security

Facts
Ms Jonkman, Ms Vercheval and Ms Permesaen, after having worked as air hostesses for Sabena SA, the Belgian national airline, made a claim for a retirement pension as civil aviation air crew. The National Pensions Office granted their claim, but for the period of 1 January 1964 to 31 December 1980 the amounts of remuneration taken into account were significantly less for air hostesses than for air stewards, despite the fact that their basic remuneration was equal. That was explained by a difference in treatment during the above-mentioned period between, on the one hand, the air hostesses and, on the other, the other cabin crew members.

Under the Royal Decree of 25 June 1997, air hostesses who had been employed as such during the period from 1 January 1964 to 31 December 1980 now had the right to a retirement pension under the same rules as those applicable to stewards, subject to a single payment of adjustment contributions, together with interest at the annual rate of 10 %. Those adjustment contributions essentially consist of the difference between the contributions paid by the air hostesses during the period from 1 January 1964 to 31 December 1980 and the higher contributions paid by the stewards during the same period.

Ms Jonkman, Ms Vercheval and Ms Permesaen were of the opinion that the adjustment provided for by the Royal Decree did not completely eliminate any discrimination between air hostesses and stewards.

The Brussels Labour Court took the view that the adjustment system laid down in the Royal Decree could be discriminatory and that the resolution of the cases depended on the interpretation of Directive 79/7/EEC. The court therefore referred two preliminary questions to the Court of Justice.

Preliminary questions
1. Is Directive 79/7/EEC to be interpreted as meaning that it authorises a Member State to adopt rules intended to allow a category of persons of a particular sex, originally discriminated against, to become eligible for the pension scheme applicable to the category of persons of the opposite sex by making retroactive payment (a single payment of a very large sum) of contributions, recovery of which would be time-barred under the legislation applicable in that State in the case of the latter category of persons?
   If so, is Directive 79/7/EEC not to be interpreted as requiring a Member State to amend legislation contrary to that provision as soon as a judgment of the Court of Justice of the European Communities rules that there is a conflict of norms and, at the very least, within the applicable time-limit for the recovery of the contributions which have become payable by virtue of the adoption of those rules?

2. Is Directive 79/7/EEC to be interpreted as meaning that it authorises a Member State to adopt rules intended to allow a category of persons of a particular sex, originally discriminated against, to become eligible for the pension scheme applicable to the category of persons of the opposite sex by making the payment of a large amount of late payment interest, the recovery of which would be time-barred under the legislation applicable in that State in the case of the latter category of persons?

   If so, is Directive 79/7/EEC not to be interpreted as requiring a Member State to amend legislation contrary to that provision as soon as a judgment of the Court of Justice of the European Communities rules that there is a conflict of norms and, at the very least, within the applicable time-limit for the recovery of late payment interest due as a result of the adoption of those rules?

Judgment of the Court of Justice

1. When a Member State adopts rules intended to allow persons of a particular sex, originally discriminated against, to become eligible throughout their retirement for the pension scheme applicable to persons of the other sex, Council Directive 79/7/EEC:
   - does not preclude that Member State from making such membership dependent upon the payment of adjustment contributions consisting of the difference between the contributions paid by the persons originally discriminated against in the period during which the discrimination took place and the higher contributions paid by the other category of persons during the same period, together with interest to compensate for inflation,
   - does preclude, by contrast, that Member State from requiring that payment of adjustment contributions to be made together with interest other than that to compensate for inflation,
   - also precludes a requirement that that payment be made as a single sum, where that condition makes the adjustment concerned impossible or excessively difficult in practice. That is the case in particular where the sum to be paid exceeds the annual pension of the interested party.
2. Following a judgment given by the Court on an order for reference from which it is apparent that the national legislation is incompatible with Community law, it is for the authorities of the Member State concerned to take the general or particular measures necessary to ensure that Community law is complied with, by ensuring in particular that national law is changed so as to comply with Community law as soon as possible and that the rights which individuals derive from Community law are given full effect.
3. Where discrimination infringing Community law has been found, for as long as measures reinstating equal treatment have not been adopted, the national court must set aside any discriminatory provision of national law, without having to request or await its prior removal by the legislature, and apply to members of the disadvantaged group the same arrangements as those enjoyed by the persons in the other category.

ECJ, 11 September 2007, Case C-227/04 P
Marie-Luise Lindorfer v Council of the European Union **[2007] ECR I-6767**[1]
Article 1a(1) of the Staff Regulations of officials of the European Communities, as inserted therein by Council Regulation (EC, ECSC, Euratom) No 781/98 of 7 April 1998

Facts
Ms Lindorfer, an Austrian national, entered the Council's service. She was established in her post and classified in Grade A5, step 2. Before entering the Council's service, she had worked in Austria for 13 years and three months. During that period, she had contributed to the Austrian pension scheme. On 15 May 1999, Ms Lindorfer requested, on the basis of Article 11(2) of Annex VIII to the Staff Regulations, the transfer to the Community pension scheme of the redemption value of the retirement pension rights which she had acquired under the Austrian scheme. The Austrian pension fund informed Ms Lindorfer that the redemption value of her Austrian pension rights had been provisionally determined. It also informed her that she could not be entitled to a pension in Austria, since she had not contributed for the minimum period of 180 months. It nevertheless suggested that she 'purchase' the missing 21 months' affiliation by payment of a sum of ATS 237 963.6. Ms Lindorfer did not take up that suggestion.

The Pensions Unit of the Council's General Secretariat sent Ms Lindorfer a note, to which was attached a calculation of the statutory annual pension contributions to be credited in accordance with the Staff Regulations. It appears from that calculation that the years of pensionable service corresponding to the transferable amount were 5 years, 3 months and 24 days. Ms Lindorfer informed the Pensions Unit that she noted its 'agreement in principle' on the transfer of the redemption value of her Austrian pension rights. However, she challenged the number of years of pensionable service stated in the calculation on the ground that the method of calculation used by the Council was discriminatory and not transparent. The calculation was based on a scheme for the transfer of pension rights, which uses different values for female and male officials.

Lindorfer submitted a complaint against that decision; the complaint was supplemented by an addendum of 25 April 2001. The Council rejected that complaint.

In her appeal, Ms Lindorfer sought to set aside the judgment of the Court of First Instance (Case T-204/01 *Lindorfer* v *Council* [2004] ECR-SC I-A-83 and II-361), by which the Court of First Instance dismissed her action for the annulment of the decision of the Council of the European Union of 3 November 2000 calculating her years of pensionable service following a transfer to the Community scheme of the redemption value of the pension rights which she had acquired under the Austrian scheme (hereinafter 'the contested decision'). The Court of First Instance concluded that the use of factors which vary according to sex in order to calculate the number of additional years of pensionable service to be credited was objectively justified by the need to ensure sound financial management of that scheme.

Pleas in law
1. The illegality of Article 10(3) and (4) of the amended Staff Regulations by Council Decision of 19 December 1994.

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[1] For the case at first instance see: Case T-204/01 *Maria-Luise Lindorfer* v *Council of the European Union* ECR – staff cases [2004] I-A-83; II-00361.

2. The illegality of Article 11(2) of Annex VIII to the Staff Regulations.
   Lindorfer claimed that the former provisions were contrary to the principle of equal treatment and that the latter provision was contrary to that principle and to the principle of freedom of movement of workers.

Judgment of the Court of Justice

1. Sets aside the judgment of the Court of First Instance of the European Communities of 18 March 2004 in Case T 204/01 *Lindorfer* v *Council* to the extent that it dismissed Ms Lindorfer's action on the ground that there was no discrimination based on sex.
2. Annuls the Decision of the Council of the European Union of 3 November 2000 calculating the number of Ms Lindorfer's years of pensionable service.
3. Dismisses the remainder of the appeal.
4. Orders the Council of the European Union to pay the costs at first instance and on appeal.

ECJ, 20 September 2007, Case C-116/06
***Sari Kiiski* v *Tampereen kaupunki* [2007] ECR I-7643**
Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002
Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding

Facts

Ms Kiiski was a teacher at a high school in Tampere. She was employed under public law subject to the collective agreement for officials and of contractual agents. On 3 May 2004, the school's principal granted her the child-care leave which she had requested to enable her to care for her child, born in 2003, for the period from 11 August 2004 until 4 June 2005. On becoming pregnant once again, on 1 July 2004 Ms Kiiski applied for an alteration of the decision granting child-care leave so that her leave would in future run from 11 August 2004 until 22 December 2004. Her request was rejected with reference to the Finish collective agreement that a new pregnancy did not constitute a justified ground for altering the duration of child-care leave. Ms Kiiski brought an action against her employer. She argued in the national court that she had been the victim of unlawful direct and indirect discrimination on grounds of sex because of her new pregnancy, when her employer, not recognising her new pregnancy as a sufficient ground, refused any alteration of her child-care leave and, by so doing, prevented her from returning to work, and even from obtaining maternity leave. The Tampere District Court (Tampereen käräjäoikeus) referred three questions to the Court of Justice.

Preliminary questions

1. Is it direct or indirect discrimination contrary to Article 2 of Directive 76/207/EEC for an employer to refuse to make changes to the date of child-care leave which has been granted to an employee or to interrupt that leave as a result of a new pregnancy of which the employee has become aware before the start of

that leave, in accordance with the settled interpretation of national provisions according to which a new pregnancy is not generally an unforeseeable and justified ground on the basis of which the date and duration of child-care leave may be altered?

2. May an employer sufficiently justify his conduct, described in the first question, which possibly constitutes indirect discrimination, from the point of view of Directive 76/207/EEC, on the ground that ordinary rather than serious problems would arise in respect of teachers' working arrangements and continuity of teaching, or on the ground that the employer would under the national provisions have to compensate the person replacing the teacher on child-care leave for the loss of pay incurred if the teacher on child-care leave were to return to work before the end of their child-care leave?
3. Can Directive 92/85/EEC be applicable, and, if so, is the employer's conduct described in the first question contrary to Articles 8 and 11 of that directive, if, while remaining on child-care leave, the employee has lost her opportunity of enjoying the pay benefits of maternity leave based on her working relationship in the public sector?

Judgment of the Court of Justice

Article 2 of Council Directive 76/207/EEC, which prohibits all direct and indirect discrimination on grounds of sex as regards working conditions, and Articles 8 and 11 of Council Directive 92/85/EEC, which govern maternity leave, preclude provisions of national law concerning child-care leave which, in so far as they fail to take into account changes affecting the worker concerned as a result of pregnancy during the period of at least 14 weeks preceding and after childbirth, do not allow the person concerned to obtain at her request an alteration of the period of her child-care leave at the time when she claims her rights to maternity leave and thus deprive her of the rights attaching to that maternity leave.

ECJ, 11 October 2007, Case C-460/06

***Nadine Paquay* v *Société d'architectes Hoet + Minne SPRL* [2007] I-08511**

Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)

Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions

Facts

The applicant, an employee with the defendant firm of architects since 24 December 1987, was on maternity leave from the month of September until the end of the month of December 1995. After her maternity leave the applicant was dismissed by means of a registered letter dated at a time when the period of protection had ended. The defendant terminated the contract on 15 April 1996, making a compensatory payment for the balance of the period of notice. The referring court noted that the decision to dismiss the applicant was taken while she was pregnant and before the end of the period of protection against dismissal, and that the decision had been taken in a number of stages. During the pregnancy the employer placed a notice for the recruitment of a

secretary in a newspaper. The employer had indicated that the post was available during the maternity leave, but also after that period. The Employment Tribunal held that the applicant's dismissal was not unrelated to the pregnancy, or at least, to the fact of the birth of her child, while she performed her work to the complete satisfaction of her employer (according to certificates issued after her dismissal).

Preliminary questions

The tribunal du travail de Bruxelles (the Employment Tribunal, Brussels) (Belgium) referred the following questions to the Court of Justice:

1. Must Article 10 of the Directive 92/85/EEC be interpreted as only prohibiting the notification of a decision of dismissal during the period of protection referred to in paragraph 1 of that article or does it also prohibit taking a decision of dismissal and attempting to find a permanent replacement for the employee before the end of the period of protection?
2. Is dismissal notified after the period of protection provided for in Article 10 of Directive 92/85/EEC, but which is not unrelated to the pregnancy and/or the birth of a child, contrary to Article 2(1) (or 5(1)) of Directive 76/207/EEC and, in such a case, must the sanction be at least equivalent to that laid down by national law in the implementation of Article 10 of Directive 92/85/EEC?

Judgment of the Court of Justice

1. Article 10 of Council Directive 92/85/EEC must be interpreted as prohibiting not only the notification of a decision to dismiss on the grounds of pregnancy and/or of the birth of a child during the period of protection set down in paragraph 1 of that article but also the taking of preparatory steps for such a decision before the end of that period.
2. A decision to dismiss on the grounds of pregnancy and/or child birth is contrary to Articles 2(1) and 5(1) of Council Directive 76/207/EEC, irrespective of the moment when that decision to dismiss is notified and even if it is notified after the end of the period of protection set down in Article 10 of Directive 92/85/EEC. Since such a decision to dismiss is contrary to both Article 10 of Directive 92/85/EEC and Articles 2(1) and 5(1) of Directive 76/207/EEC, the measure chosen by a Member State under Article 6 of that latter directive to sanction the infringement of those provisions must be at least equivalent to the sanction set down in national law implementing Articles 10 and 12 of Directive 92/85/EEC.

ECJ, 6 December 2007, Case C-300/06
***Ursula Voß* v *Land Berlin* [2007] n.y.r.**
Article 141 EC

Facts

Ms Voß was a civil servant employed as a teacher by the Land of Berlin. She worked as a part-time teacher on the basis of 23 teaching hours per week. At that time, the number of teaching hours required of a full-time teacher was 26.5. Between 11 January and 23 May 2000, Ms Voß worked between four and six teaching hours each month in addition to her normal working hours. The remuneration received by Ms Voß for that period amounted to DEM 1 075.14, while the remuneration received by a full-time teacher for the same number of hours of work amounted to DEM 1 616.15 in respect of the same period. According to the national court, the explanation for that

situation lies in the fact that the hours worked by Ms Voß which are classed as overtime were paid at a rate lower than the hourly rate applied to the corresponding number of hours worked by a full-time teacher which, for the latter, count as normal working hours. The national court thus found that, in respect of the months from January to May 2000, for an equal amount of work Ms Voß was paid less than a teacher employed full time.

Preliminary question
The Bundesverwaltungsgericht decided to refer the following question to the Court of Justice for a preliminary ruling:

1. Does Article 141 EC preclude national legislation under which remuneration for additional work which takes place outside of normal working hours is paid at the same rate with regard to full-time as well as part-time civil servants and that rate is lower than the pro-rata remuneration allotted to full-time civil servants as regards a period of equal length within normal working hours where it is predominantly women who are employed part time?

Judgment of the Court of Justice:
Article 141 EC is to be interpreted as precluding national legislation on the remuneration of civil servants, such as that at issue in the main proceedings – which defines overtime, for both full-time civil servants and part-time civil servants, as hours worked over and above their normal working hours, and which remunerates those additional hours at a rate lower than the hourly rate applied to their normal working hours, so that part-time civil servants are less well paid than full-time civil servants in respect of hours which are worked over and above their normal working hours, but which are not sufficient to bring the number of hours worked overall above the level of normal working hours for full-time civil servants – where:

– in the group of workers subject to that legislation, a considerably higher percentage of women is affected as compared with the percentage of men so affected; and
– the difference in treatment is not justified by objective factors wholly unrelated to discrimination based on sex.

ECJ, 16 January 2008, Order of the Court in joined cases C-128/07 to C-131/07
Angelo Molinari, Giovanni Galeota, Salvatore Barbagallo and Michele Ciampi **v** ***Agenzia delle Entrate – Ufficio di Latina***
Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security and Case C-207/04[2]

Preliminary questions:
The Commissione Tributaria Provinciale di Latina referred the following questions to the Court of Justice:

1. Must the judgment in Case C-207/04 be interpreted as meaning that the Italian legislature should have extended to men the advantageous age limit that applies to women?

[2] Case 207/04 *Paolo Vergani* v *Agenzia delle Entrate, Ufficio di Arona* ECR [2005] I-07453.

2. Must it be held in the present case that a rate equal to half of the rate applied for the taxation of severance pay must be applied to sums received as voluntary redundancy incentives by men who have passed the age of 50?
3. Given that amounts paid by way of personal income tax do not form part of the taxpayer's salary since they are not paid by the employer in respect of the employment, and given that an amount paid by an employer to an employee as an incentive is not in the nature of pay, is it consistent with Community law to rule that the application of different age limits – namely 50 years of age for women and 55 years of age for men – is contrary to Community law, in light of the fact that Directive No 79/7/EEC permits the Member States to preserve different pensionable ages?
4. Must Community law (Council Directive 76/207/EEC, which prohibits discrimination on grounds of sex) be interpreted as precluding – or as not precluding – the application of the relevant national rules that gave rise to the present case, with the effect that the national legislation (Article 17(4a) (now Article 19(4a) of DPR No 917/86) must be regarded as incompatible – or compatible – with Community law

Order of the Court of Justice:

1. Following the judgment in Case C-207/04, in which national legislation was found to be incompatible with Community law, it is for the authorities of the Member State concerned to adopt the general or specific measures necessary to ensure that Community law is complied with in their territory, those authorities retaining the choice of measures to be taken to ensure that national law is changed so as to comply with Community law and that the rights which individuals derive from Community law are given full effect. Where there has been found to be discrimination contrary to Community law, for as long as measures reinstating equal treatment have not been adopted, a national court must set aside any discriminatory provision of national law, without having to request or await its prior removal by the legislature, and apply to members of the disadvantaged category the same arrangements as those enjoyed by the persons in the other category.
2. The derogation provided for in Article 7(1)(a) of Council Directive 79/7/EEC is not applicable to a tax measure such as provided for in Article 17(4a) of Decree No 917 of the President of the Republic of 22 December 1986, as amended by Legislative Decree No 314 of 2 September 1997.

ECJ, 26 February 2008, Case C-506/06

***Sabine Mayr* v *Bäckerei und Konditorei Gerhard Flöckner OHG* [2008] n.y.r.**

Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)

Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions

Facts

Ms Mayr was employed as a waitress by Flöckner from 3 January 2005. In the course of attempted in-vitro fertilisation and after hormone treatment lasting for about one and a half months, a follicular puncture was carried out on Ms Mayr on 8 March

2005. Her general practitioner certified her sick from 8 to 13 March 2005. On 10 March 2005, by telephone, Flöckner informed Ms Mayr that she was being dismissed with effect from 26 March 2005.

She claimed the payment of her salary and *pro rata* annual remuneration from Flöckner, maintaining that the notice of dismissal given on 10 March 2005 had no legal effect because, from 8 March 2005, the date on which the in-vitro fertilisation of her ova took place, she was entitled to protection against dismissal. Flöckner disputed the claim on the ground that no pregnancy existed on the date on which notice of the dismissal was given.

Preliminary question

The Oberster Gerichtshof decided to refer the following question to the Court for a preliminary ruling:

1. Is a worker, who undergoes in-vitro fertilisation, a 'pregnant worker' within the meaning of the first part of Article 2(a) of Directive 92/85/EEC if, at the time at which she was given notice of dismissal, the woman's ova had already been fertilised with the sperm cells of her partner and 'in-vitro' embryos thus existed, but they had not yet been implanted within her?

Judgment of the Court of Justice

Council Directive 92/85/EEC and, in particular, the prohibition of the dismissal of pregnant workers provided for in Article 10(1) of that directive must be interpreted as not extending to a female worker who is undergoing in-vitro fertilisation treatment where, on the date she is given notice of her dismissal, her ova have already been fertilised by her partner's sperm cells, so that in-vitro fertilised ova exist, but they have not yet been transferred into her uterus.

Article 2(1) and 5(1) of Council Directive 76/207/EEC preclude the dismissal of a female worker who, in circumstances such as those in the main proceedings, is at an advanced stage of in-vitro fertilisation treatment, that is, between the follicular puncture and the immediate transfer of the in-vitro fertilised ova into her uterus, inasmuch as it is established that the dismissal is essentially based on the fact that the woman has undergone such treatment.

ECJ, 6 March 2008, Case C-340/07

***Commission of the European Communities* v *Grand Duchy of Luxembourg,* ECR [2008] n.y.r.**[3]

Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions

Judgment of the Court of Justice

1. Declares that, by not having adopted within the prescribed period, all the laws, regulations and administrative provisions necessary to comply with Directive 2002/73/EC, the Grand Duchy of Luxembourg has failed to fulfil its obligations under the first paragraph of Article 2(1) of that directive.
2. Orders the Grand Duchy of Luxembourg to pay the costs.

[3] Available in French

ECJ, 1 April 2008, Case C-267/06
***Tadao Maruko* v *Versorgungsanstalt der deutschen Bühnen* [2008] n.y.r.**
Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

Facts
On 8 November 2001 Mr Maruko entered into a life partnership with a designer of theatrical costumes. Mr Maruko's life partner had been a member of the German Theatre Pension Institution (the 'VddB') since 1 September 1959 and had continued to contribute voluntarily to that institution during the periods when he was not obliged to be a member.

Mr Maruko's life partner died on 12 January 2005. By a letter dated 17 February 2005, Mr Maruko applied to the VddB for a widower's pension. By its decision of 28 February 2005, the VddB rejected his application on the ground that its regulations did not provide for such an entitlement for surviving life partners.

According to Mr Maruko, the VddB's refusal infringed the principle of equal treatment, given that, since 1 January 2005, the German legislature had placed a life partnership and marriage on an equal footing. To deny that a person whose life partner has died is entitled to survivor's benefits on the same conditions as a surviving spouse is discrimination on the ground of that person's sexual orientation.

Preliminary questions
The Bayerisches Verwaltungsgericht München decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
1. Is a compulsory occupational pension scheme, such as the scheme at issue in this case administered by the VddB, a scheme similar to state schemes as referred to in Article 3(3) of Council Directive 2000/78/EC?
2. Are benefits paid by a compulsory occupational pension institution to survivors in the form of widow's/widower's pensions to be construed as pay within the meaning of Article 3(1)(c) of Directive 2000/78/EC?
3. Does Article 1 in conjunction with Article 2(2)(a) of Directive 2000/78/EC preclude regulations governing a supplementary pension scheme under which a registered partner does not, after the death of his partner, receive survivor's benefits equivalent to those available to spouses, even though, like spouses, registered partners live in a union of mutual support and assistance formally entered into for life?
4. If the preceding questions are answered in the affirmative: Is discrimination on grounds of sexual orientation permissible by virtue of Recital 22 in the preamble to Directive 2000/78/EC?
5. Would entitlement to the survivor's benefits be restricted to periods from 17 May 1990 in the light of the case law in Barber?

Judgment of the Court of Justice
1. A survivor's benefit granted under an occupational pension scheme such as that managed by the Versorgungsanstalt der deutschen Bühnen falls within the scope of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.
2. The combined provisions of Articles 1 and 2 of Directive 2000/78/EC preclude legislation such as that at issue in the main proceedings under which, after the death of his life partner, the surviving partner does not receive a survivor's benefit

equivalent to that granted to a surviving spouse, even though, under national law, life partnership places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor's benefit. It is for the referring court to determine whether a surviving life partner is in a situation comparable to that of a spouse who is entitled to the survivor's benefit provided for under the occupational pension scheme managed by the Versorgungsanstalt der deutschen Bühnen.

ECJ, 24 April 2008, Joined Cases C-55/07 and 56/07
***Othmar Michaeler, Subito GmbH and Ruth Volgger* v *Amt für sozialen Arbeitsschutz and Autonome Provinz Bozen,* ECR [2008] n.y.r.**
The Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC annexed to Council Directive 97/81/EC

Facts
By its decisions of 25 March and 29 April 2003 the Amt für sozialen Arbeitsschutz, formerly the Arbeitsinspektorat der Autonomen Provinz Bozen, imposed fines of EUR 233 550 in total on Subito and its legal representatives, Mr Michaeler and Ms Volgger, since they had failed, contrary to Article 2 of Decree-Law No 61/2000, to notify that body of several part-time employment contracts. Article 2 of the Decree-Law imposes the obligation on employers to send a copy of a part-time employment contract to the provincial office of the competent Labour and Social Security Inspectorate, within 30 days of signature of that contract. The national court had doubts about the conformity of this provision with Directive 97/81/EC, while the indirect effect of this provision undermines the equality of men and women since part-time work more often involves the latter

Preliminary question
Are national provisions which impose an obligation on employers to send a copy of part-time employment contracts within 30 days of their signature to the competent provincial office of the Labour Inspectorate, which provide for the imposition of a fine of EUR 15 in respect of each worker concerned and each day of delay in the event of a failure to do so, and which do not set an upper limit for the administrative fine contrary to Community law provisions and Directive 97/81/EC?

Judgment of the Court of Justice
Clause 5(1)(a) of the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC annexed to Council Directive 97/81/EC must be interpreted as precluding national legislation such as that at issue in the main proceedings which requires that copies of part-time employment contracts be sent to the authorities within 30 days of their signature.

Case C-537/07: Reference for a preliminary ruling from the Juzgado de lo Social No 30 (Madrid) lodged on 3 December 2007
Evangelina Gómez-Limón Sánchez-Camacho* v *Instituto Nacional de la Seguridad Social (INSS), Tesorería General de la Seguridad Social (TGSS), Alcampo SA
Official Journal C 064 of 8 March 2008, pp. 16-17

The referring court, the Juzgado de lo Social No 30, asked the following qestions:

1. Bearing in mind that the granting of parental leave must be a measure intended to promote equality, in the manner and to the extent freely fixed by each Member State within the minimum limits imposed by Directive 1996/34/EC, is it possible that the enjoyment of that period of parental leave, in the case of a reduction in the working day and in salary by reason of taking care of children, should affect rights in the process of being acquired by the worker, male or female, taking such parental leave and may individuals rely before the public institutions of a State on the principle of the protection of rights acquired or in the process of being acquired?
2. In particular, does the expression "rights acquired or in the process of being acquired" in Clause 2(6) of the Framework Agreement on parental leave include only rights related to working conditions and affect only the contractual relationship with the employer or, on the contrary, does it also affect the maintenance of rights acquired or in the process of being acquired in matters of social security, and is the requirement of "continuity of the entitlements to social security cover under the different schemes" in Clause 2(8) of the Framework Agreement on parental leave satisfied by the formulation under consideration and applied by the national authorities and, if applicable, is the right to continuity of entitlements to social security cover sufficiently certain and precise to be relied upon before the public authorities of a Member State?
3. Are the provisions of Community law compatible with national legislation which, during the period of reduction in the working day by reason of parental leave, reduces the amount of invalidity pension to be paid in relation to what it would have been before that leave and reduces the accrual and consolidation of future benefits in proportion to the reduction in working hours and in salary?
4. Given the duty of the national courts to interpret national law in the light of the obligations imposed by the Directive, in order to enable the objectives of the Community legislation to be achieved to the greatest possible extent, must that requirement apply equally to the continuity of social security entitlements during the period of parental leave and, specifically, in the circumstances of the case to a form of part-time leave or reduction in the working day such as was used on this occasion?
5. In the specific circumstances of the case, does the reduction in the grant and accrual of social security entitlements during the period of parental leave constitute direct or indirect discrimination contrary to the provisions of Directive 79/7/EEC of 19 December 1978 on the principle of equal treatment and non-discrimination for men and women in matters of social security and is it contrary to the requirements of equality and non-discrimination between men and women, in accordance with the tradition common to all the Member States, to the extent that this principle must apply not only to conditions of employment but also to the public activity of social protection of workers?

Case C-559/07: Action brought on 17 December 2007
Commission of the European Communities* v *Hellenic Republic
Official Journal C 037 of 9 February 2008, p. 21

Pleas in law and the main arguments of the Commission

1. The Commission, after examining the provisions in force of the Greek Civil and Military Pensions Code, found that they provide that women are entitled to a retirement pension at a different age from men and under different conditions regarding the minimum period of service required.
2. In the light of the Court of Justice's case law, the Commission submits that the pensions in question, which are paid by an employer to a former worker as a consequence of the employment relationship between them, constitute pay within the meaning of Article 141 EC. Furthermore, because of the particular nature of the pension systems in question, under which pensions depend on the period of service completed and on the worker's salary prior to the grant of a pension, the persons drawing a pension constitute, in the Commission's view, "a particular category of workers", while the method of financing and managing the pension system does not constitute a decisive factor for the application of Article 141 EC.
3. Also, in the Commission's submission, the conditions for application of Article 141(4) EC, which concerns providing for specific advantages to make it easier for the under-represented sex to pursue a vocational activity, are not met.
   In this instance, the provisions in question do not help to correct the problems which women may face in their professional careers but, on the contrary, facilitate their withdrawal from the labour market.
4. Furthermore, the justification pleaded, regarding the State mechanism being caused to malfunction and the consequent laying down of transitional provisions, is not persuasive in the Commission's view because, first, economic consequences which could result for a Member State do not justify in themselves the temporal restriction of the application of rules of Community law and, second, the Hellenic Republic has not in practice demonstrated the existence and precise nature of the malfunctioning pleaded.

5 Consequently, the Commission considers that, by maintaining in force provisions concerning different retirement ages and different minimum-service requirements for men and women under the Greek Civil and Military Pensions Code, the Hellenic Republic has failed to fulfil its obligations under Article 141 EC.

Case C-63/08, Reference for a preliminary ruling from the Tribunal du Travail d'Esch-sur-Alzette, Grand Duchy of Luxembourg lodged on 18 February 2008
Virginie Pontin* v *T-Comalux S.A.
Official journal C 092 of 12 April 2008, p. 21

The questions referred by the Tribunal du travail d'Esch-sur-Alzette are:

1. Are Articles 10 and 12 of Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) to be interpreted as not precluding the national legislature from making a legal action brought by a pregnant employee who has been dismissed during her pregnancy subject to time-limits fixed in advance, such as the eight-day period

laid down in the second subparagraph of Article [L.] 337(1) of the Luxembourg Code du Travail or the fifteen-day period laid down in the fourth subparagraph of that provision?

2. If the answer to the first question is in the affirmative, are the eight and fifteen-day periods to be regarded as being too short to allow a pregnant employee who has been dismissed during her pregnancy to take legal proceedings to safeguard her rights?
3. Is Article 2 of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, to be interpreted as not precluding the national legislature from denying a pregnant employee who has been dismissed during her pregnancy the right to bring an action for damages for wrongful dismissal, which is reserved, under Articles L. 124-11(1) and (2) of the Code du Travail, to other employees who have been dismissed?

Reference for a preliminary ruling from the Hof van Cassatie (Belgium) lodged on 17 March 2008
C. Meerts* v *Proost NV
Official Journal C 128 of 24 May 2008, p. 4

Question referred by the Hof van Cassatie:

1. Are clauses 2.4, 2.5, 2.6 and 2.7 of the Framework Agreement on parental leave concluded on 14 December 1995 by the general cross-industry organisations UNICE, CEEP and the ETUC which is annexed to Council Directive 96/34/EC of 3 June 1996 on the Framework Agreement on parental leave concluded by UNICE, CEEP and the ETUC to be interpreted as meaning that, where an employer unilaterally terminates an employment contract without urgent cause or without compliance with the statutory period of notice at a time when the worker is availing himself of arrangements for reduced working hours, the payment in lieu of notice that is due to the worker must be determined by reference to the base salary calculated as if the worker had not reduced his working hours as a form of parental leave in accordance with clause [2],3(a)] of the Framework Agreement?

Decisions of the United Nations Committee on the Elimination of Discrimination against Women (CEDAW)

Vienna Intervention Centre against Domestic Violence a.o.* v *Austria, 6 August 2007 (No 5/2005 and No 6/2005)

Both cases concern domestic violence by a husband against his wife. In the first case the husband attacked his wife on several occasions and threatened to kill her.[1] This was reported to the police but the public prosecutor denied all requests to detain the husband. Shortly afterwards the public prosecutor halted the prosecution of the husband on the ground that there was insufficient reason to prosecute him. The wife was subsequently shot by her husband and killed.

In the second case also multiple reports of violence and threats to kill were made to the Vienna police.[2] The public prosecutor again denied the requests to detain the husband. Although an interim injunction had been issued by a district court forbidding the husband from returning to their apartment and its surroundings, the wife was stabbed to death by the husband near the family apartment.

In both cases the Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice submitted a complaint against Austria on behalf of the descendents of the deceased women. The complainants maintained that the State had not actively taken all the appropriate measures to protect the women's right to personal security and life.

The CEDAW was of the opinion in both cases that the facts constituted a violation of the rights of the deceased to life and physical and mental integrity under Article 2 (a) and (c) through to (f), and Article 3 CEDAW, read in conjunction with Article 1 of the Convention and General Recommendation 19 of the Committee. The Committee made several recommendations to the State, which are not aimed at the adoption of new legislation but to strengthen the implementation and monitoring of the existing legislation. Better communication, coordination and training programmes for law enforcement and judicial officers must ensure that the appropriate action is taken to protect women from violence.

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1 http://www.frauenrechtsschutz.at/Content.Node/Communication-5-2005.doc (this is not the official texts. The official texts will be published in due time on http://www.un.org/womenwatch/daw/cedaw/protocol/dec-views.htm).

2 http://www.frauenrechtsschutz.at/Content.Node/Communication-6-2005.doc (this is not the official texts. The official texts will be published in due time on http://www.un.org/womenwatch/daw/cedaw/protocol/dec-views.htm).

News from the Member States and EEA countries

AUSTRIA – *Anna Sporrer*

Introduction

In Austria, the prohibition of discrimination on grounds of sex has been enshrined in Article 7 of the Federal Constitution since 1920. In 1998 a new paragraph was added to it, in which the Federal State, the regions and the communities acknowledge the principle of *de facto* equality of men and women and in which measures aimed at the promotion of *de facto* equality between women and men are declared admissible. In 2008, the Federal Constitution was again amended in such a way that the Federal State, the regions and the communities will have to aim at *de facto* equality between women and men when preparing their budgets.

The principle of gender equality has been implemented into all areas of the labour market as well as the field of goods and services, by several equal treatment acts for the private sector and the public services of the federal state and the regions. Moreover, the equal treatment acts for the public sector contain provisions on affirmative action and the promotion of women, which oblige all representatives of the employer to aim at the elimination of the existing under-representation of women and existing disadvantages of women with respect to working relations. For this reason the equal treatment acts applicable to the public sector go further then what EU law requires.

Regarding enforcement and compliance aspects, the Austrian legal system provides for high standards concerning the enforcement of individual rights, whereas collective means of enforcement have not yet been developed to the same level.

Policy developments

On 5 March 2008 the Council of Ministers passed two guidelines on Gender Mainstreaming within Legislation and Gender Budgeting, and they were issued by the Minister for Women's Affairs.

These guidelines shall be distributed within the administration in order to facilitate the better implementation of gender-relevant aspects when drafting legislation and budgeting.[1] The guidelines concerning gender mainstreaming are aimed at distributing knowledge and skills on how to conduct gender impact assessments while drafting legislation. The guidelines concerning gender budgeting are aimed at a systematic and comprehensive analysis of budgeting under aspects of gender justice.

Legislative developments

Amendments to the Federal Equal Treatment Act and the Equal Treatment Acts for the private sector

The amendments to the Federal Equal Treatment Act concern the protection of workers with fixed-term contracts against discrimination, the obligatory representation of women in all commissions dealing with public service law (such as disciplinary commissions), an extended definition of sexual harassment, the right to compensation

[1] The guidelines are published in German at: http://www.frauen.bka.gv.at/site/5557/default.aspx#a4, accessed 12 May 2008.

in cases of discriminatory termination of service and cumulative compensation in cases of multiple discrimination (OJ I 97/2008).

The amendments to the Equal Treatment Acts for the private sector contain the implementation of the EU Goods and Services Directive into the Austrian legal system, improvements concerning the definition of sexual harassment, the increase of the minimum amount of compensation in cases of discrimination related to the access to jobs and cases of harassment, the admissibility of promotional measures in favour of women in the area of labour and goods and services, clarification that the prohibition of gender discrimination also applies to fixed-term job relations, creation of an option in cases of discrimination regarding the cessation of service between the claim against the dismissal and compensation, clarification that multiple discrimination has to be taken into account when deciding upon compensation, as well as other improvements concerning the provisions regarding discrimination on grounds of race and ethnic origin (OJ I 98/2007).

Administrative law

Due to the Federal Equal Treatment Act all federal ministries have to issue affirmative action plans for women, which have to be renewed every second year and have to formulate concrete aims and goals for the advancement of women in all fields and at all levels. Thus the action plan by the Ministry of Defence (OJ II 94/2008) and the action plan by the Ministry of Science and Research (OJ II 97/2008) have been amended.

Case law national courts

Supreme Court

Relation between views of the Equal Treatment Commission and the courts[2]

Due to § 61 of the Equal Treatment Act the courts have to consider the views of the Equal Treatment Commission if such views have been made known *prior* to the judgment. In the relevant case the Commission's views were delivered *after* the ruling of the second instance court, which was contrary to the Commission's views, as the court was of the opinion that the employer was not obliged to offer exactly the same post to a female employee returning from parental leave. The Supreme Court stated that – as the claimant was not able to raise the Commission's views prior to the court's ruling – the court did not have to consider the Commission's opinion according to which discrimination on grounds of sex had been ascertained. The Supreme Court thereby refused to apply § 61 of the Equal Treatment Act and to reconsider the case in the light of the Commission's views. This raises concerns about the relation between a specialized body for equal treatment affairs, namely the Equal Treatment Commission, and the ordinary judicial system in Austria.

Child-care allowance for parents working in Liechtenstein[3]

The claimant's husband was working at an enterprise with its seat in the Principality of Liechtenstein and he was entitled to a birth allowance (*Geburtszulage*) from Liechtenstein. Therefore the Austrian authority denied the mother's entitlement to an Austrian child-care allowance. With reference to the jurisdiction of the ECJ concerning

2 OGH 07.02.2008, 9 Ob A183/07p.
3 OGH 27.11.2007, 10ObS109/07p.

Article 76 Regulation (EEC) No 1408/71 and Article 10 Regulation (EEC) No 574/72[4] the Supreme Court stated that the allowances – due to differences in their structure and function – are not comparable with each other and therefore the parents are entitled to both allowances in parallel.

CEDAW Committee's opinion not relevant for a domestic court[5]
In August 2007 the CEDAW Committee delivered two opinions in cases of domestic violence and ascertained that the Republic of Austria was responsible for the infringement of women's rights as the women in question had been killed by their husbands and the police and the justice authorities had not effectively protected the victims. In parallel to the international proceedings, the heirs of the murdered women filed claims of state liability against the Republic of Austria, which were turned down by the civil courts. In one of these proceedings the claimants referred to the CEDAW Committee's opinion in their appeal against the ruling of the court at second instance. The Supreme Court stated, however – in contrast to the CEDAW Committee – that no failures by the police or justice authorities had taken place and, moreover, that the views and recommendations of the CEDAW Committee were not relevant for the examination of the case and did not have to be considered by the national courts.[6]

High Administrative Court
The High Administrative Court revoked an administrative decree according to which the vacation rights of a civil servant who had been on leave due to maternity protection had lapsed. The Court found a case of discrimination on grounds of sex and stated that the administration had to apply EC law directly, namely Article 5 of Directive 76/207/EC.[7]

BELGIUM – *Jean Jacqmain*

Policy developments

Thirty years after Belgium adopted its first legislation on gender equality in employment, non-discrimination is generally supposed to go without saying and not to deserve much attention. For instance, while the case law on harassment at work (of which as many men as women are complaining) is expanding, hardly anybody (i.e. hardly any women) still complain about sexual harassment, which suggests that complaining of harassment is much more modern and, in fact, honourable. In the same way, both political deciders and the media pay much more attention to situations and cases of 'other discriminations' (grounded on race, age, handicap, etc.), as though gender discrimination was a thing of the past. Consequently, the periodical publication of surveys which reveal that the gender pay gap still exists invariably appears to create a shocked surprise among politicians and blasé attitudes among the media.

The very long political crisis which followed the federal general election of June 2007 was not propitious to any bold initiative in the field of gender equality. A proper

4 Rs C-104/80, Beeck, Slg 1981, 503 Rz 12; Rs C-24/88, Georges, Slg 1989, 1905 Rz 13; Rs C-119/91, McMenamin, Slg 1992, I-6393 Rz 27; Rs C-543/03, *Dodl und Oberhollenzer*, Slg 2005, I-5049 Rz 59; Rs C-153/03, Weide, Slg 2005, I-6017 Rz 30.
5 OGH 29.11.2007, 1Ob243/07d.
6 www.frauenrechtsschutz.at, accessed 19 June 2008.
7 VwGH 11.10.2007, 2006/12/0167.

federal government was finally installed at the end of March, with rather tepid terms of reference which, however, include a firm engagement to comply with the Gender-mainstreaming Act of 12 January 2007.[8] Under that Act, the impact of any proposed measure (whatever its objective) on gender equality must be assessed before the measure may be adopted; in that way, and within the federal jurisdiction, Belgium aims to implement the resolutions of the UNO World Conference on Women (Beijing, 1995) as well as Article 1(1)(bis) of Directive 76/207/EEC, as amended by Directive 2002/73/EC.

Legislative developments

Promulgated on 10 May 2007, the new set of anti-discrimination laws[9] includes the 'Act aimed at combating discrimination between women and men', generally known as the Gender Act, which purports to implement (within the federal Parliament's jurisdiction) all the relevant EC directives on gender equality,[10] including Directive 2004/113/EC. As to the use of gender-related actuarial factors in insurance, Article 10 of that Act originally provided that such an exception as allowed by Article 5(2) of the Directive could be applied, but no later than 21 December 2007. Under pressure from *Assuralia*, the insurance companies' federation, and in spite of the resistance by *Test-Achats/Aankoop*, the main consumers' rights organisation, the Act was amended on 21 December 2007 so that the exception remains available beyond that date.[11]

The Act will be amended a second time, and along the same lines, by the Multi-Purpose Act which is being processed in Parliament at the time of writing the present contribution. So far, Article 12(2) of the Act has addressed gender equality in occupational pension schemes for employees, allowing for the use of gender-related actuarial factors within the limits tolerated by Article 6 of Directive 86/378/EEC as amended by Directive 96/97/EC. That provision had been copied from the previous Gender Equality Act of 7 May 1999. However, Belgium had never transposed Directive 86/378/EEC as far as self-employed persons were concerned. The second amendment thus extends Article 12 to include the latter persons so that gender discrimination is forbidden in principle, but gender-related actuarial factors may be used in fixed-contribution schemes and, under certain conditions, in fixed-benefit schemes which are financed by capitalization.

Regrettably, neither amendment was examined in the light of the *Lindorfer* decision of the ECJ in case C-227/04 P, which questions the validity of gender-related actuarial factors under the fundamental principle of the equality of men and women. Ominously, neither the Council of Equal Opportunities for Men and Women nor the Institute for Equality of Women and Men (the 'gender equality body') were invited to give their opinions on the proposed second amendment.

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8 See *Bulletin on Legal Issues in Equality*, No 2/2007, available at http://ec.europa.eu/employment_social/gender_equality/legislation/bulletin_en.html, accessed 13 June 2008.

9 See *Bulletin on Legal Issues in Equality*, Nos 1/2007 and 2/2007, available at http://ec.europa.eu/employment_social/gender_equality/legislation/bulletin_en.html, accessed 13 June 2008.

10 See N. Wuiame, L. Markey and J. Jacqmain, 'L'égalité entre les femmes et les hommes: la loi du 10 mai 2007 au regard de la directive "refonte"', *Chroniques de droit social*, 2008, p. 1.

11 Act of 21.12.2007, *Moniteur Belge/Belgisch Staatsblad,* 31.12.2007, 7th ed.

Case law national courts

It so happens that there is no development worth mentioning since 1 January 2008. Neither the Labour Court of Appeal of Brussels nor the Labour Court of Brussels have so far delivered a final judgment after the ECJ's rulings in *Jonkman*, C-231/06 through C-233/06 and *Paquay*, C-460/06 respectively. In the first case, the Belgian Court had referred to the ECJ for a preliminary ruling on the purport of Article 4 of Directive 79/7/EEC when domestic legislation must remedy the present consequences of the previous exclusion of a group of women (i.e. air hostesses) from a special statutory pension scheme; in the second one, it concerned a preliminary ruling on the scope of the notion 'dismissal related with the pregnancy or maternity' under Directives 92/85/EEC and 76/207/EEC.

BULGARIA – *Genoveva Tisheva*

Introduction and policy developments

One year after the EU accession, Bulgarians are the poorest EU citizens and have to face one of the highest levels of inflation in Europe (14 %). People's expectations of an improvement in standards of living have not been met and this has led to mistrust concerning the Government's capacity to implement further reforms.

Obviously, in this environment, it is difficult to promote sustainable positive trends and changes in policy and legislation in the field of gender equality. Additional barriers to making gender equality a higher priority of the Government continue to be the lack of any real political will, the budgetary constraints, the absence of a gender equality mechanism in Bulgaria and a lack of knowledge and capacity by representatives of the administration and of the judiciary. Despite the lack of financial support, women's organisations remain one of the main driving forces concerning the implementation of EU standards on gender equality.

In the first few months of 2008, the Bulgarian Government assessed the level of compliance of Bulgarian legislation with the provisions of the Recast Directive 2006/54/EC. This process is a very opportune moment to stress once again the need for a separate Law on Gender Equality and a respective institutional mechanism. As a matter of fact, Article 20 of the Recast Directive obliges Member States to establish a body or bodies to promote, analyse, monitor and support equal treatment based on sex. These bodies may form part of agencies with competences for the protection of human rights. In order to comply with these requirements, the Bulgarian Government has to critically analyze the competences and performance of the existing equality body – the Commission for Protection from Discrimination, in the field of gender equality. Currently, the Commission has no competence in promoting, analysing, monitoring and supporting equal treatment based on sex, as required by the Directive. Compliance with the Directive has to be confirmed by 15 August this year and there is a hope that this process will trigger the adoption of new legislation and mechanisms in the field.

Legislative developments

No specific gender equality legislation has been adopted in the first four months of 2008, but there are general legislative provisions as well as drafts and suggestions for

amendments to the legislation, which have the potential of impacting positively on equality between men and women. A new Code of Civil Procedure (CPC) has been in force since 1 March 2008. Among other positive changes, the CPC contains new and amended provisions in Chapter 26: 'Procedure in marital cases'. Especially relevant for gender equality are the changes in the field of the conciliation procedure and the procedure concerning interim measures during divorce cases. Instead of the so-called 'conciliation hearing', which was obligatory in the previous CPC, there are options for mutually agreed mediation or other extra-judicial conciliation procedures. A new regulation is now in place concerning interim measures ordered by the courts during divorce, such as temporary arrangements for issues like the maintenance of the child and among the spouses, the use of the family dwelling, the assets acquired during the marriage and child custody. In order to expedite the procedure, the new code provides for a maximum term of two weeks for issuing such orders, which are not subject to appeal. All these changes favour the better protection of individual rights and the rights of children in the family and will ensure a more effective protection for women against violence.

Another positive step in the achievement of gender equality is the draft Family Code adopted by the Council of Ministers which was recently introduced in Parliament. The draft provides for the recognition of some legal consequences of registered partnerships and several legal regimes concerning property relations are envisioned, the division of property and marital contracts included, instead of the currently existing obligatory regime of community of property. These changes will promote spouses' freedom of personal development, a principle adopted for the first time in the draft Family Code. The forthcoming innovative legislative solutions (new for the Bulgarian legal system, but corresponding to realities already rooted in society) have provoked reactions from some conservative groups which want to see a return to 'Christian values'.

Suggestions for changes to the Law on Protection against Domestic Violence (in force since April 2005) are currently being considered by a working group established by the Ministry of Justice. They are aimed at more effective protection for victims of violence by means of civil and criminal law and involve the financial accountability of the State for programmes for the prevention and protection of victims of violence. This will be a further step in the implementation of the EU Roadmap on Gender Equality.

Equality body decisions

At the end of March 2008, along with its Annual Report for 2007, the Bulgarian equality body announced important decisions under the Law on Protection from Discrimination and concerning the equal treatment of men and women.

The cases decided by the Second Specialized Panel of the Commission for Protection from Discrimination (CPFD) and confirmed by the Supreme Administrative Court are the *Devnya Cement* case and the *Sofia University gender quota* case.

In the first case (CPFD Decision No 29 of 4 July 2006, confirmed by the Supreme Administrative Court Decision No 10594 of 1 November 2007), instigated by a female worker at Devnya Cement – Varna, a Joint Stock Company, continuous unequal treatment of the applicant was found in the form of unequal pay for work of equal value, compared to her male colleagues. The Commission declared that this constituted a violation of Article 14(1) (the equal pay provision) of the Law on Protection from Discrimination (LPFD). Furthermore, the CPFD found that the violation

amounted to direct discrimination based on gender within the meaning of Article 4(2) of the LPFD. The Commission's arguments were that the applicant had been continuously discriminated against in the period from January 2003 until the moment of her retirement – May 2006 – through receiving unequal pay in comparison with her male colleagues appointed to the same position of 'mill operator' and performing work of equal value. The defendant could not justify the monthly difference in pay of BGN 45 (around EUR 23) given to the applicant compared to her male colleagues. Moreover, the defendant confirmed that, during the period under consideration, the company failed to ensure equal pay for its workers. Subsequently, the Commission ordered Devnya Cement to discontinue the practice of unequal treatment based on gender and to amend the Collective Agreement to include guarantees of equal pay, irrespective of gender and any other grounds, as required by Article 14(1)–(2) of the LPFD.

The second case (CPFD Decision No 53 of 14 November 2006, confirmed by the Supreme Administrative Court Decision No 11457 of 20 November 2007) is an interesting case on gender quota for the admission of students as practised by Sofia University. The case was brought to the Commission in 2006 at the initiative of the Association for European Integration and Human Rights – *Plovdiv;* it was finally decided by the Supreme Administrative Court. The arguments for discrimination based on gender were the following: in 2004 Sofia University applied an admission quota system of 40 % men and 60 % women for the subject 'Bulgarian Philology'. As a result, male candidates were discriminated against because they had to compete for fewer places; on the other hand, female candidates were also discriminated against because, in practice, as women generally perform better in examinations, the minimum score for admitted women was higher than the minimum score for admitted men. As a consequence, it was argued, the quota system practised by the University represented discrimination based on gender and the measure could not be justified as a 'legitimate aim' within the meaning of Article 7(2)(12) of the LPFD.[12] The Commission and the Supreme Administrative Court did not consider the quota to be a discriminatory measure, and based their decisions on the following arguments: the quota represented differential treatment based on the objective criterion of a difference in the biological development of women and men and in these circumstances represented a measure for ensuring a balanced representation of the two sexes in university education; such a measure was perceived by the Commission and the Court as being also a means of avoiding the complete feminization of the given academic subject and thus of the related professions.

The above-mentioned cases are unique in the practice of the Bulgarian administrative jurisdictions and the Bulgarian courts on gender discrimination issues. The *Devnya Cement* case is the first case related to equal pay which benefited from the final sanction of the Supreme Administrative Court. The *gender quota* case is of key importance concerning gender segregation within the labour market, which is a real problem in Bulgaria in the field of the teaching and language professions. Both cases have the potential to generate further case law and debate in society.

[12] According to this provision, the measures adopted in education and training are not considered to be discriminatory if they are aimed at a balanced representation of men and women and as long as these measures are considered to be necessary.

CYPRUS – *Lia Efstratiou-Georgiades*

Introduction

The good performance of the economy of Cyprus during the last few years, in spite of a challenging external environment, has resulted in the integration of Cyprus into the Euro area from 1 January 2008. These achievements validate the Government's economic policies during recent years, enabling Cyprus to meet all the necessary preconditions for a successful accession to the Euro zone.

The labour market of Cyprus continues to exhibit conditions of full employment. As stated in the National Reform Programme, the Cypriot labour market is characterized by conditions of near full employment and relatively high participation and employment rates. During 2006, aided by a favourable Gross Domestic Product growth rate, the labour market situation returned to the satisfactory levels of 2004, after the modest deterioration that was observed in 2005. Indicatively, the overall participation rate, according to the Labour Force Survey, rose to 73.0 % compared to 72.4 % in 2005, whereas the unemployment rate fell to 4.5 % compared to 5.3 % in 2005. Furthermore, the overall employment rate increased to 69.6 %, following the drop to 68.5 % in 2005, and has almost reached the 2010 Lisbon target of 70 %. The employment rate for women also increased to 60.3 %, from 58.4 % in 2005, exceeding for the first time the relevant Lisbon target of 60 % for 2010. The employment rate for older workers increased to 53.6 % from 50.6 %, remaining above the relevant Lisbon 2010 target of 50 % for 2010.

Policy developments

Concerning gender equality, a National Action Plan was adopted by the Government in 2007, aiming to promote gender equality in all spheres of policy; public funds allocated or other support given to NGOs by the National Machinery for Women's Rights – directly or through the Local Authority Dimension programme – rose further in 2007; and a study commissioned on the problem of the pay gap was completed and policy measures for reducing the gap were suggested, to be implemented in consultation with public authorities, social partners and stakeholders.

The National Plan of Action for the Equality of Men and Women 2007-2013 was prepared by the Ministry of Justice and Public Affairs, National Machinery for Women's Rights. Its basic intention is the modernisation of the social prototype with the intention of utilising the complete workforce regardless of gender, and the total eradication of all forms of discrimination against women. It is a policy with a horizontal character as prescribed by the principle of mainstreaming. The basic aims of the National Plan of Action regarding employment and social integration are (a) a substantial reduction in differences between the sexes (employment percentages, unemployment and remuneration), (b) a better combination of professional and family life and child care so that, by 2010, it will reach 90 % of children from 3 years of age until the start of compulsory education, and at least 33 % of children under 3 years of age. Emphasis will be placed on specific measures that facilitate the integration of unemployed women such as (a) specialised supplementary knowledge, (b) support in finding appropriate jobs, (c) relieving them from family obligations, (d) flexible working hours and/or environment, (e) limiting the division of labour on the market according to gender, (f) lifelong learning, (g) the promotion of modern and flexible types of em-

ployment, and (h) improving living conditions and standards of living for women who belong to 'vulnerable social' categories.

Legislative developments

Protection of maternity

(1) On 25 July 2007 the law that amended the Protection of Maternity Law No (109(I)/2007) was published in the Government Gazette and it included: (a) maternity leave extended from 16 weeks to 18 weeks and the period during which mothers have the right to be absent from work for 1 hour, increased from 6 to 10 months, (b) the Industrial Disputes Court is the court with jurisdiction to solve these questions,(c) the sentence for an employer in the event that he is found guilty has been increased from EUR 1 708.60 to EUR 6 834.41.[13]

(2) On 18 April 2008 the law that amended the Protection of Maternity Law No (8(I)/2008) was published in the Government Gazette and it provides for the extension of maternity leave from 14 to 16 weeks (for adoptive mothers) and benefits for employees who adopt child. Entry into force on 25 July 2008.

Treatment of men and women at work and vocational training

(3) On 31 December 2007 the Amending Law that provides for the Equal Treatment of Men and Women at Work and in Vocational Training (176(I)/2007)[14] was published. The purpose of the Law is as follows: (a) The correct harmonisation of Directive 2002/73/EC of the EU. The modification concerns the area of implementation and the exceptions that refer to any less favourable treatment of women because of pregnancy or maternity leave, constituting discrimination that goes against the intention of the law. (b) The modification and amendment of the duties of the relevant Gender Equality Committee in Employment and Vocational Training and the provision of independent assistance to victims of discrimination.

The Gender Equality Committee in Employment and Vocational Training GECEVT is the Committee which was set up on 15 June 2003 based on the Law on Equal Treatment for Men and Women in Employment and Vocational Training No (205(I)/2002) (implementing Directive 76/207/EC), responsible for various mattes falling within the purpose and scope of the Law, such as hearing complaints or bringing complaints on its own initiative to the chief inspector, who will investigate them further. The GECEVT consists of a chairman appointed by the Minister of Labour and Social Insurance. The members of the committee are civil servants and representatives of social partners and the secretary of the National Machinery for Women's Rights. The GECEVT has an advisory role.

Implementation of the Principle of Equal Treatment between men and women in the access and supply of goods and services

(4) On 17 April 2008 Parliament passed a law on 'The implementation of the Principle of Equal Treatment between men and women' in the access to and supply of goods and services in line with Directive 2004/113/EC. The Law has not yet been published in the Government Gazette. 'Articles 1 to 16' of Directive 2004/113/EC are incorporated into the Law. The Law provides the authorities which are empowered with monitoring the provisions: (a) The Registrar of Insurance controls and monitors

[13] The Protection of Maternity Law 100(I)/1997, 45(I)/2000, 64(I)/2002, 109(I)/2007, 8(I)/2008.
[14] 2005(I)/2002, 191(I)/2004, 40(I)/2006, 42(I)/2006, 176(I)/2007.

the insurance contracts. (b) The District Court is the body empowered to resolve questions and to provide remedies on the ground of sex. The District Court shall award just and equitable compensation which shall cover at least the whole of the real damage plus nominal interest. (c) The Commissioner of Administration (the Ombudsman) is the body empowered for out of court protection. (d) The National Machinery of Women's Rights is the body empowered to promote equal rights principles and accordingly to inform every other body involved. (e) The Minister of Justice and Public Order must report to the Commission before 21 December 2009 and then every five years on the application of the Law. Furthermore, it is provided that a breach of the Law is punishable with a fine of up to EUR 7 000 or up to six months imprisonment or both.

Case law national courts

Master and servant – Dismissal – Maternity Law

In criminal case 9277/2006 at the Limassol District Court, the Director of Inspection Works, a Department of the Ministry of Labour, charged M and M Investments Ltd with the unlawful termination of employment, in breach of the Maternity Protection Law (100(I)/97 as amended by laws 45(I)/2000 and 64(I)/2002) (pregnancy dismissals). The complainant believed that her employer had terminated her employment with the company due to her pregnancy. The charge which the accused company faced constitutes a criminal offence punishable with a fine not exceeding EUR 1 708.60. An employer is not prohibited from dismissing an employee during pregnancy if she, by her misconduct, renders herself liable to dismissal. The accused, in their defence, alleged that the complainant did not submit a medical certificate confirming her pregnancy and/or the employee, by failing to arrive punctually for work, rendered herself liable to dismissal. The Court, after hearing evidence from both sides, rejected the allegations of the employer and decided that the prosecution had proved beyond reasonable doubt all the elements of the offence of the illegal termination of the complainant's employment due to her pregnancy and that the prosecution failed to shift the burden of proof on to the defendant and he was found guilty and sentenced to a fine of EUR 854.30.

Equality body decisions/opinions

Ombudsman – File No A.K.I. 90/2007, AKI 104/2007

The decision in both cases was related to complaints from two female employees who had adopted children and who alleged that the Protection of Maternity (Amended) Law of 2007 (N109(I)/2007) introduces discrimination against women who adopt children given that the provision increasing the maternity leave by two weeks only applies to women who give birth.

The Commissioner was of the opinion that the non-extension of maternity leave by two weeks for women who adopt could not be objectively justified and it discriminated against adoptive mothers. The decision was published on 24 March 2008.

File No AKI 103/2007, date 14 March 2008

The complainant submitted her complaint against the company where she was employed as a secretary, regarding the handling by the management of a complaint that she had submitted regarding sexual harassment. The complainant was dismissed 15 days after she submitted her complaint on the grounds of having repeatedly ignored

work regulations and/or acting inappropriately whilst executing her duties. Her employment was terminated following communications between the company and the Labour Relations Department in Paphos and the trade union representative.

During this investigation the Commissioner discovered that the Labour Relations Officer and the trade unions in Paphos had never been officially informed or trained by the Labour Ministry with regard to the legislation relating to discrimination in general, and sexual harassment in particular. The Commissioner stated that the Labour Ministry had an explicit obligation to inform all relevant parties regarding the rights and the provisions of the Equal Treatment of Men and Women in Employment Law and the Vocational Training Law 2002 to 2007.

In this specific case the Ministry of Labour failed to perform its legal obligation to adequately inform and educate interested parties on the correct procedures for dealing with complains regarding sexual harassment in the workplace. This resulted in the fact that the employer was misinformed and misguided so that the complainant was dismissed without first investigating the accusation of sexual harassment in the workplace.

The Ombudsman issued a recommendation to the employer to the effect that: (a) the Company should establish procedures for dealing with sexual harassment and to decide on the internal machinery for dealing with such accusations, (b) the Company should inform all of its workers that sexual harassment will not be tolerated and that disciplinary measures will be imposed upon any employee who disregard the rules.

Miscellaneous

The Statistical Service circulated a book entitled *The Statistical Portrait of Women in Cyprus, Social statistics series 1, report 1* that includes eight thematic sectors: (1) demographic characteristics, (2) how women live, (3) education, (4) employment, (5) public life, (6) health, (7) poverty, and (8) crime.

One of these sectors, employment mentions comparative situations between men and women and states that despite the increased participation of women in the labour force over the past few years, a wide difference in all age groups still remains. By comparing the female employment rates in Cyprus for the age group 15-64 with those of the European Union during 1999-2006, one can conclude that the rates in Cyprus in 2006 reached the target of 60 %, set in Lisbon. In the education and health sectors, 3 out of 4 employed persons are women; whereas 7 out of 10 employed persons in industries and in agriculture/forestry/fishing are men. Among legislators and managers there was limited improvement and 68.9 % of part-time workers were women. During these years, the total unemployment rate for women has been higher than that for men and the gender pay gap has decreased from 33 % in 1994 to 25 % in 2005. In the poverty sector, the risk of poverty is higher among women as compared to men. In 2006 it was 18 % amongst women and 14 % for men and it increased when they lived alone: 52 % for women as compared to 28 % for men.

CZECH REPUBLIC – *Kristina Koldinská*

Policy developments

After its EU accession, the Czech Republic has continued to implement EC equality directives. The main political issue in this area is the ever-lasting attempt to adopt the

Anti-Discrimination Act. Unfortunately, there is strong general EU scepticism among right-wing political parties, which took power after the elections of 2006. The Czech president – Vaclav Klaus – is also well-known for his EU-sceptical opinions. The political situation is therefore rather difficult and uneasy with respect to adopting the Anti-Discrimination Act, whereas on the other hand, it should be argued, that the bill is of a poor legislative quality.

In the field of promoting equal opportunities for men and women, several projects have been realised by different NGOs, including raising awareness. There is also a long-lasting project to be concluded this year – Gender in Management, which explores all gender aspects in management from several points of view, using sociological and statistical methods.

Although the number of cases brought to court has recently risen, gender remains a rather neglected topic of general discussion and it seems that problems with gender discrimination remain as serious as they were.

Legislative developments

During the first few months of 2008 there have been two important developments in the Czech Republic. The first concerns legislative amendments to and the adoption of the new Anti-discrimination Act. The second development concerns case law and some recent decisions of the Czech courts which are discussed below.

As has already been reported on many occasions in the Czech Republic,[15] the Anti-discrimination Act has had and continues to have a long development history. It was newly drafted and presented to Parliament in July 2007; in March 2008 it was finally accepted by the Chamber of Deputies and on 23 April 2008 the Bill was also approved by the Senate. Now, just the signature of the President is required in order to adopt the Act and finalise the legislative procedure.

The Act is relatively short: it has only 19 sections (including those amending some other acts). The Act lays down the right to equal treatment in areas of employment and access to employment, access to vocational training, entrepreneurship and self-employment, membership of and activity in trade unions, councils of employees or organisations of employers, membership of and activity in professional chambers, social security, social benefits, health care, education, and access to goods and services. The Act defines direct and indirect discrimination, harassment and sexual harassment, and it also includes a negative definition of discrimination (acceptable different treatment).

Quite a large part of the Act (two large sections) is dedicated to equal payment for men and women in social security systems for workers. This is because of the fact that the Czech Republic does not have a system of occupational pensions, which, however, does not exclude the state from implementing the Occupational Pensions Directive. Therefore, Section 8 of the Anti-discrimination Act states that the employer shall not discriminate on the ground of sex if he/she provides his/her employees or former employees with benefits of a financial or non-financial character intended to supplement the benefits provided by statutory social security schemes, or to replace them, in cases of sickness, invalidity, old age, industrial accidents or illnesses and unemployment.

The Anti-discrimination Act further provides for the possibility of applying to a court in case of discrimination and the competences of the public defender of rights

[15] *Bulletin on Legal Issues in Equality*, Nos 3/2006 and 1/2007, available at http://ec.europa.eu/employment_social/gender_equality/legislation/bulletin_en.html, accessed 13 June 2008.

(the Ombudsman) have been extended in the sense that the Ombudsman shall provide procedural assistance to victims of discrimination when they apply to a court and commence court proceedings. Furthermore, the Ombudsman shall engage in research, publish reports and make recommendations regarding issues related to discrimination, and ensure the exchange of information among competent equality bodies on the European level. However, the Ombudsman does not have the competence to represent victims before the courts or to provide any further legal assistance.

The proposed Act has been heavily criticised, especially by right-wing deputies and senators.[16] The discussion in both chambers was however more ideological than reasoned and there was not much criticism regarding the legislative level of the proposed Act. Liberty in general and the liberty of private legal relations were the issues which were most discussed. Those fears expressed by deputies and senators who were critical of the proposed Act were related to the hypothetical danger of creating a situation of no freedom of choice and the obligation to establish a legal relationship with someone, without having a choice. According to those deputies, employers or entrepreneurs could otherwise be accused of discrimination. These doubts are, of course, not at all realistic and the Czech Act is minimalistic rather than wide in its scope. In general, the climate in society is more against the Act and also the Minister who proposed the bill and presented it to Parliament has said that he is personally also not very happy with the Bill, but that we have to accept it because of our obligations towards the EU.

Case law national courts

As regards case law, there are two cases to be reported.

Case No 24C66/01

The first concerns reproductive rights and was decided on 29 February 2008 when the Regional Court in Brno gave its ruling[17] in the long-lasting case (it had taken eight years) of a woman who had undergone an abortion when she was 18 years old. She was pregnant and expecting twins. She decided to have an abortion, but during the surgery one of the two foetuses survived and she unknowingly continued her pregnancy with one of the foetuses. When she then went to her gynaecologist, it was too late to carry out another abortion. She gave birth to a healthy baby girl. The woman asked for compensation from the hospital, arguing that due to the unsuccessful abortion she could not complete her studies, could not work, and had to remain at home with the baby on maternity leave receiving an allowance which was much lower than her potential salary. She asked for CZK 300 000 (EUR 10 921) and the Court decided that the hospital was obliged to pay CZK 80 000 (EUR 2 912).

This is the first case of its type in the Czech Republic. The decision is not yet final (the hospital may still appeal) and it has not been published. Therefore the reasoning behind the decision is not known. However, this is a very interesting case and some medical practitioners fear that other cases like this could create risks regarding mutual confidence between doctors and patients. Unfortunately, in the media this case was not approached from the perspective of reproductive rights at all.

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[16] See the minutes of the debate in both chambers in the Czech language at http://www.psp.cz/eknih/2006ps/stenprot/028schuz/s028167.htm#r2 and http://www.senat.cz/xqw/xervlet/pssenat/hlasovani?action=steno&O=6&IS=3875&T=225#st225, accessed 26 April 2008.

[17] No 24C 66/2001, not published.

Case No 27C90/2004

The second case concerned a Czech diplomat in Libya – a woman who had been appointed and felt that she had been discriminated against. She argued that her superior ridiculed her, often openly, saying that his colleague was 'just a woman' and he did not cooperate properly with her. When she tried to resolve the problem and started to communicate with her employer (the Ministry of Foreign Affairs), she was given her notice with the argument that she had not acquired the necessary authorisation to work with secret documents, which is a prerequisite for the position she worked in. The Court of First Instance decided in favour of the plaintiff, but in April 2008 the Prague City Court overturned the decision and delivered a judgment in favour of the employer. An appeal is still pending as the plaintiff has declared that she wishes to take the case to the Supreme Court. The Czech Supreme Court should decide on this case by the end of 2008.[18]

DENMARK – *Ruth Nielsen*

Policy developments

The employment rate for women in Denmark is around 70 %, whereas it is around 76 % for men. As a result, economically speaking, most Danish women are fairly independent of men. Denmark's labour market, however, is highly sex-segregated. In the spring of 2008, around 100 000 health and day-care workers in the public sector – primarily women – went on strike after wage talks collapsed in April. Their three-year collective agreement expired at the end of April and under Danish law these workers can strike to put pressure on the employers in order to obtain a better agreement. The strike included nurses, social workers and pre-school employees in the public sector, but employees in emergency care did not take part. The trade union in question, the FOA, has a membership of about 211 000 workers primarily in the public sector, including childcare, nursing and caring services for the elderly. The nurses' union, the DSR, represents about 75 000 members. The trade unions demanded a 15 % wage increase over the next three years, while the public-sector employers offered an increase of 12.8 %. The nurses obtained 13.3 %. DSR also wanted Denmark to set up an equal-pay commission to look into the level of salaries in jobs traditionally held by women. In August, the Prime Minister promised to set up a pay commission.

Legislative developments

Amendments to the Equal Pay Act in order for Denmark to implement the Recast Directive

On 28 March 2008, the Danish Government proposed an amendment to the Equal Pay Act in order to implement the Recast Directive (2006/54/EC).[19]

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[18] In this case, it is not as yet very clear whether discrimination has really been found or not. On the one hand, there is some evidence that the plaintiff's superior did not have a good working relationship with her; on the other hand, there does not seem to be sufficient evidence of the fact that he did not treat her well because of the fact that she is a woman. It may also have been decided that it was 'simply' a case of both the employer and the employee not respecting their general obligations (apparently she allowed certain foreigners to enter the embassy building without a proper reason for doing so etc.).

[19] Directive 2006/54/EC, OJ L 204, 26.7.2006, pp. 23-36.

The proposal gives rise to the same problems with regard to the definition of indirect discrimination and the lack of monitoring concerning equality bodies that are currently being discussed between the Danish Government and the Commission in relation to the Equal Treatment Act implementing the amended Equal Treatment Directive (2002/73/EC); the Discrimination Act implementing the Racial Equality Directive (2000/43/EC); and the Framework Directive on Equality in Employment and Occupation (2000/78/EC). The European Commission sent a formal notice to Denmark on these points in 2007.

The definition of indirect discrimination

Under the Recast Directive 'indirect discrimination' arises where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary. The term 'legitimate aim' in the Recast Directive is translated as *sagligt formål* (sound and proper aim) in the proposed implementing Act and not, as in the Danish version of the Directive, as *legitimt mål* (legitimate aim). Under Danish labour law, working conditions will normally be considered *saglige* (sound and proper) if they result from collective bargaining and can be seen as an expression of what the labour market organisations on both sides regard as reasonable. 'Legitimate aim' in the Directive is an EU law concept which does not vary according to what the parties to collective agreements find acceptable. The use of the Danish word *saglig* (sound and proper) instead of *legitim* (legitimate) gives the impression that the parties to collective agreements have freedom to decide what is legitimate. This is, arguably, an incorrect interpretation of the Directive.

When transposing the Directive on gender equality in access to and the supply of goods and services (2004/113/EC) where the definition of indirect discrimination is the same as in the Recast Directive as a result of an amendment to the Equality Act, Denmark chose to follow the wording of the Directive *verbatim*.

This means that there are now two different definitions of 'indirect discrimination' in Danish equality legislation: one in the Discrimination Act, the Equal Treatment Act and the future Equal Pay Act, where it deviates from the underlying directives by using the word *saglig* (sound and proper) instead of *legitim* (legitimate), and a different one in the Equality Act using the word *legitim* (legitimate) and following the underlying directive *verbatim*.

Equality bodies under Article 20 of the Recast Directive (2006/54/EC)

In the proposed amendments to the Equal Pay Act, Denmark silently ignores the obligation to establish one or more equality bodies as stipulated in Article 20 of the Recast Directive according to which Member States shall designate a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on the ground of sex. Member States shall ensure that the competences of these bodies include: (a) providing independent assistance to victims of discrimination in pursuing their complaints about discrimination; (b) conducting independent surveys concerning discrimination; and (c) publishing independent reports and making recommendations on any issue relating to such discrimination. There are similar requirements for gender equality bodies in the amended Equal Treatment Directive Article 8a and in the Directive on gender equality in access to and the supply of goods and services Article 12, which Denmark also chose to ignore.

Denmark has no gender equality bodies with the competences outlined in those Directives, only complaints boards with the competence required under (a) above.

In connection with the implementation of the Equal Treatment Directive, a number of organisations, including the Danish Confederation of Trade Unions (LO), have criticised this point. The Government's response was that there are many institutions in Denmark which might analyse gender equality, for example the universities. In the view of the Government, there is no need for a special body with regard to gender equality.

The parallel provision on ethnic equality in Article 13 of the Race Directive is correctly implemented in Denmark by Section 10 of the Ethnic Equality Act which empowers the Danish Institute of Human Rights to promote ethnic equality. An easy way for Denmark to comply with the gender equality directives on this point would be to extend the competence of the Danish Institute of Human Rights to also cover gender equality.

New Equality Complaints Board for all the prohibited grounds of discrimination

In Denmark, the Minister for Employment circulated a proposal for a new Act on a Complaints Board for Equality in January 2007 and announced his intention to present it to Parliament in February 2007. According to the proposal, the Act would establish a Complaints Board concerning discrimination on all the prohibited grounds in the gender equality legislation and the Discrimination Act, which covers other grounds of prohibited discrimination than gender, such as ethnic origin, religion or beliefs, age, handicap, sexual orientation, political opinion or social origin. The new Complaints Board should deal with both discrimination in employment and in other areas, e.g. the provision of goods and services. The proposal gave rise to many critical comments, in particular from the social partners, and the preparation of the Bill to be presented to Parliament took longer than originally envisaged. In May 2007, the Minister for Employment announced that at that time it was the intention of the Danish Government to present the proposal to Parliament when it reconvened in October 2007. The Government finally presented its proposal to Parliament on 12 December 2007 and it has since been under debate in Parliament.

The existing Complaints Boards for Gender Equality and Ethnic Equality will be abolished. Their functions will be taken over by the new Complaints Board, probably from 1 January 2009 onwards. The new general Complaints Board is modelled on the existing Complaints Board for Gender Equality. It will – like the existing gender equality complaints board – be empowered to deal with complaints about discrimination from the victims thereof. It will have no competence to conduct independent surveys concerning discrimination, to publish independent reports or to make recommendations on any issue relating to such discrimination and it will not be able to start cases at its own initiative. It will therefore not be a monitoring body in the sense required by Article 20 of the Recast Directive, see above.

ESTONIA – *Anneli Albi*

Policy developments

In Estonia, the Gender Equality Act was adopted in 2004 to harmonise national law with EU law, as required by EU membership conditions. In the meantime, the institu-

tion of the Gender Equality Commissioner has been established. The process of adopting gender equality legislation, along with the activities of the Gender Equality Commissioner, have increased awareness concerning gender equality issues in Estonian society. In particular, the media now frequently report on statistical studies according to which the gender pay gap amounts to 25 %, being one of the highest in Europe. Additionally, it is increasingly noted that both men and women would gain from gender equality law, as at present the life expectancy varies considerably between men and women due to traditional stereotypes of men as the breadwinners. Overall, however, against the background of forced equality during the Communist system, the prevailing opinion in society remains against gender equality measures and is premised on the view that no serious issues regarding gender equality exist in Estonia. Instead, many measures related to gender equality have been presented as demographic policy measures to encourage the birth rate, in particular the much celebrated state-funded parental salary which allows a parent to retain his or her salary during parental leave.

By way of recent legislative initiatives, several draft acts are pending in Parliament, which may have an impact on gender equality issues. These have partly been shaped by the general economic climate, where high economic growth has been replaced by an economic slowdown and a consequent reduction in the demand for labour. The Government has initiated a new draft Labour Contracts Act, which completely amends the present law, aiming to liberalise employment relationships so as to make the labour market more flexible. The initial draft also fully revised the guarantees for pregnant workers and parents of small children; however, some additional guarantees were subsequently inserted following public concern about reduced protection standards. The reports of the Gender Equality Commissioner show that the unequal treatment of pregnant workers and persons with small children is the main ground of the complaints submitted to her.

Legislative developments

Draft Equal Treatment Act (No 267 SE III)

The draft Equal Treatment Act, which aims to implement Directives 2000/43/EC and 2000/78/EC, is currently being discussed by Parliament. The draft Act is analogous to the earlier draft Equal Treatment Act (No 67 SE), which did not find sufficient support in Parliament and was discontinued. The main point of discussion has concerned the establishment of a supervisory institution: the Act foresees the creation of the post of Equality Commissioner to supervise the fulfilment of the Act, thereby merging the posts of the Gender Equality Commissioner and the Equality Commissioner. The post would be taken up by the current Gender Equality Commissioner. However, merging the posts has met with strong opposition from women's organisations due to the concern that gender equality issues would receive less attention in the future.

Draft amendments to the Gender Equality Act

The Government has initiated a draft Act to amend the Gender Equality Act and the Civil Service Act. The amendments have the following aims: (a) to bring the definitions of direct and indirect discrimination, harassment and harassment on the grounds of sex better into line with those used in EU directives; (b) to improve the protection against gender discrimination with regard to access to goods and services and to guarantee the victims of discrimination the right to request compensation; (c) to bring the burden of proof provisions better into line with the requirements of Directives

97/80/EC, 2004/113/EC and 2006/54/EC; (d) to introduce into the Gender Equality Act the provisions to guarantee protection against victimization; (e) to introduce the obligation to involve non-governmental organisations in the promotion of gender equality. These issues were inadequately addressed in the existing legislation.

Draft Family Law Act (No 55 SE II-1)

Considerable controversy has been sparked in Estonian society by the draft of the new Family Law Act (currently under consideration by Parliament), which proposes a change to the property rights regime for spouses. At present, spouses have joint property ownership, whereas the draft Act envisages a separate ownership regime, where the spouse whose property's value has increased less during the marriage would be entitled to a compensation claim. Critics fear that the draft Act will fail to provide sufficient guarantees for the weaker party, typically women with child-care responsibilities. While this area falls beyond EU competence, it might be worth considering at the political level whether such a move would be compatible with European values.

Amendments to the Holidays Act

On 1 January 2008, amendments to the Holidays Act came into force, introducing the right for fathers to take ten working days' leave during the pregnancy leave or maternity leave of the mother or within two months after the child is born (Section 30^1). During this time, the father receives a holiday allowance amounting to his average salary, with the maximum being three times the average national wage. Prior to these amendments, fathers rarely made use of this holiday arrangement as they would only have been entitled to the minimum wage.

Equality body decisions/opinions

Annual Report of the Gender Equality Commissioner

In the autumn of 2007, the Gender Equality Commissioner issued her first annual report (2005/2006).[20] The report provided an overview of the opinions delivered by the Commissioner and of the activities to raise awareness on gender equality. During the reported period the Commissioner received 44 applications and information requests: 14 from men and 30 from women. Twenty-seven applications concerned discrimination; other communications were considered as requests for information or memoranda, including from members of Parliament and representatives of local governments. In thirteen complaints the Commissioner found a breach of equal treatment rules. The majority of the complaints regarding employment concerned recruitment and were brought by women who were pregnant or had young children. The following cases may be of wider interest.

Role of online recruitment portals

The applicant raised the question whether the requirement by recruitment firms for applicants to declare their sex, the number and age of children and family status in internet-based CVs constitutes discrimination based on sex. The applicant noted that in a number of job interviews, the employers, equipped with information about her family status and children, spent a considerable amount of time asking about her child-care arrangements and her ability to commit herself to the work. On each occa-

[20] The report can be accessed in Estonian at http://www.svv.ee/failid/2006.pdf, accessed 30 April 2008.

sion, the job had eventually been given to a male applicant. It should be noted that in Estonia web-based recruitment firms play a key role in recruitment. The Commissioner found that the mandatory requirement to declare the above data cannot be considered as direct discrimination because it applies to all clients. However, the obligation to provide the above-mentioned data may raise doubts as to whether the parents of young children would receive job offers due to this data. In such cases the discriminatory treatment would be on the part of the employer rather than the recruitment service provider; the latter cannot be held responsible for the discriminatory behaviour of the employer. However, the Commissioner did issue a recommendation to recruitment firms to abolish the requirement to provide the above data in CV portals because of the potential to lead to discrimination by employers.

Pregnancy
A female job applicant had initially been offered, in a conversation, the post of a specialist, with a salary of EEK 13 000 (EUR 833) per month. However, after her prospective employer heard that she was pregnant, she was instead offered the post of assistant, with a salary of just EEK 5 500 (EUR 353) per month. The Gender Equality Commissioner held that such conduct constituted discriminatory treatment.

Overtime work
A female employee with a 1-year old child had been excluded from any overtime work on the assumption that she had family obligations. The Commissioner held that an employer is not allowed to assume that the employee would not consent to work overtime; the employee should be consulted on whether she needs special protection due to family obligations. Otherwise, the employer's knowledge of an employee's family obligations might become an obstruction to free self-fulfilment and contravene equal treatment.

Gender stereotypes in education
In Estonia, the Gender Equality Act goes beyond EU requirements by prohibiting discrimination in all areas of social life, including education. The Commissioner received a communication from a person who was concerned about reproducing traditional gender roles in a pre-school child-care institution. The communication was based on a newspaper article that reported that girls and boys were assigned different activities at a kindergarten, with boys being involved in woodwork and wrestling and girls in gymnastics. The Commissioner recommended that the local government should change the information on its webpage so that it would not present some activities as being exclusively the preserve of boys or girls; a refusal to offer either activity to children would constitute a violation of the principle of equal treatment based on sex.

Nightclub entry fees
The Gender Equality Commissioner received several complaints concerning different nightclub entry fees for men and women, as women can often enter nightclubs for free, whereas men have to pay. The Commissioner pointed out that nightclubs have to act in accordance with the principle of equal treatment because their activities as service providers fall under the scope of the Gender Equality Act, and that different entry fees may be directly discriminatory towards men. The Commissioner also pointed out that, at present, the Gender Equality Act does not expressly provide for the right to have recourse to the courts in order to request compensation for damage or the termination of a harmful activity, as Article 13 of the Gender Equality Act is confined to

employment disputes. Consequently, the Commissioner called for an amendment to the Gender Equality Act in order to transpose Council Directive 2004/113/EC in its entirety.

Chancellor of Justice

Besides the Gender Equality Commissioner, discrimination disputes in Estonia can also be brought to the Chancellor of Justice, an institution similar to an ombudsman. The following case recently sparked considerable interest in Estonia. A woman who had been elected to the post of chairman of a local government council had to resign from her post when she commenced her pregnancy and child-care leave. The Chancellor of Justice initiated proceedings to analyse whether sufficient guarantees against discrimination are in place for such situations. The Local Government Organisation Act provides that the chairman or deputy chairman of the local government council has the right to stay pregnancy and child-care leave, for the duration of which the person's powers as *a member of the local government council* are suspended. The suspension of *council membership* commences once the person is absent for more than three months and, under Article 42(2) of the Act, this simultaneously leads to the termination of the powers of the *chairman/deputy chairman of the council*. The person in question has a right to have his or her powers as *a member of the local government council* restored; however, he/she cannot return to the post of *chairman/deputy chairman* after parental leave as his/her powers had been terminated. The Chancellor of Justice found that the situation where the person cannot return to his or her position as a remunerated chairman or deputy chairman after the suspending of his or her authority as a member of the local government council does not constitute a disproportionate restriction of the person's rights. This is because a return to a post after two years, for example, might cause difficulties in planning and conducting the activities of the council. However, as a result of these proceedings, the Chancellor of Justice made a proposal to the Minister of Justice and the Minister for Regional Affairs to introduce draft legislation that would improve the regulation of respective guarantees.[21] The Chancellor of Justice also pointed out that the ministries ought to analyse whether the existing rules are in accordance with the EU anti-discrimination directives.

FINLAND – *Kevät Nousiainen*

Policy developments

Government Equality Programme

The Government Resolution on the Government Action Plan for Gender Equality 2008–2011[22] contains a plan for the implementation of the gender equality priorities of the present Government Programme of 2007. The Action Plan seeks to promote gender mainstreaming, women's careers and reconciliation of family and working

[21] The proposal by the Chancellor of Justice is availabe (in Estonian) at: http://www.oiguskantsler.ee/public/resources/editor/File/01_M_rgukiri_justiitsministrile_ja_regionaalministrile_seoses_kohaliku_omavalitsuse_volikogu_esimehe..._ning_lapsehoolduspuhkusele__m_rts_2008.pdf, accessed 31 March 2008.

[22] Government Action Plan for Gender Equality 2008–2011. Helsinki 2008, 52 pp. (Ministry of Social Affairs and Health, Publications, ISSN 1236-2050; 2008:21) ISBN 978-952-00-2652-3 (pb), ISBN 978-952-00-2653-0 (PDF). http://www.stm.fi/Resource.phx/publishing/store/2008/07/hu1216290184078/passthru.pdf, accessed 27.7.2008

life, to reduce violence against women and to reduce the gender pay gap, to decrease gender segregation caused by gendered educational choices at school, and to reinforce gender equality commitment as part of state governance. For example, the Ministry of Employment and the Economy will make a gender impact analysis of the policy programme for employment, entrepreneurship and working life. The Government Programme envisioned all important policy measures to be gender mainstreamed, but the Action Plan requires mainstreaming of at least one major project in each ministry. All ministries are expected to establish functional equality groups, which are responsible for the follow-up of gender mainstreaming in the ministry in question.

Many of the problems targeted by the Action Plan have proven difficult to tackle successfully. The gender pay gap, for example, has remained unchanged in spite of the previous and the present governments' and the social partners' concerted efforts. The policies that have been followed so far will be reviewed, and the new state pay system will be gender assessed.

Violence against women has been recognized as a major problem in Finland, but in spite of the various projects to decrease it, the level of violence has remained high. Now, the Government is going to involve experts at the ministries and increase cooperation between the various government branches. Many of the targeted actions are aimed at problems usually met by women. Men's movements in Finland have criticized the official equality policy for concentrating only on women. Not surprisingly, therefore, some of the planned actions are now clearly targeted at men. For example, fathers are targeted in policies focused on the reconciliation of family and working life. The gendered aspects of long-term housing problems, also targeted in the Action Plan, are recognized as mainly being the problem of marginalized men.

Legislative developments

Amendment to and the unification of equality legislation

A specific committee (hereafter the Equality Committee) was set up in January 2007 to prepare an amendment to the equality legislation. The first stage of the preparatory work was aimed at making legislative choices concerning legal and institutional unification. The Equality Committee heard experts and organized a seminar on alternative choices in 2007, and published an interim report in February.[23] The report was circulated for comment in March 2008. The interim report presented three alternative models: one for separate equality grounds, one consisting of a single 'general' act for both gender equality and other equality grounds, but also two separate 'specific' acts, one for gender equality and discrimination, and the other for other prohibited grounds of discrimination. The third model is based on a single act and a single equality body. The Committee presented many arguments for the single body model, but did not openly recommend any of the alternatives. One of the strong arguments for a single equality body is that it would be easier to combat intersectional discrimination if the diverse prohibited grounds would be under the same authority. Gender equality authorities (the Ombudsman for Equality, the Council for Gender Equality, and the Gender Equality Unit) pointed out in the consultation procedure, however, that unification could lead to reduced resources for and less political emphasis on gender equality.

[23] *Tasa-arvo- ja yhdenvertaisuuslainsäädännön uudistustarve ja –vaihtoehdot. Yhdenvertaisuustoimikunnan välimietintö, Komiteanmietintö 2008:1 Oikeusministeriö.*

The Non-Discrimination Act (21/2004) was enacted in 2004 mainly in order to transpose Directives 2000/43/EC and 2000/78/EC. The Act prohibits more grounds of discrimination than the Directives, however. Parliament was not satisfied with the Act, although it enacted it in order to comply with the need to implement the Directives. Parliament required that a review of the Act should soon be undertaken so that the different prohibited grounds of discrimination would be more coherently covered as to their substance, remedies and sanctions, and the prohibited grounds of discrimination in the Constitution would equally be covered. With the 2005 amendment to the Act on Equality between Women and Men (609/1986) Parliament also expressly required a review of the amendment to be made in 2009. Therefore it came as something of a surprise to most gender equality experts that the Act on Equality is part of the amendment of non-discrimination law prepared by the Ministry of Justice. The point of departure for the preparatory work is ambitious, as all prohibited grounds of discrimination should be treated equally as far as possible, and the Non-Discrimination Act contains a non-exhaustive list of grounds. There is strong emphasis on human and fundamental rights in the preparatory work, in contrast to former times when the strong presence of the social partners and a labour law-related approach was the rule.

After the interim report, a sub-committee on working life was established under the Equality Committee. So far, the Committee has hardly even started to discuss the actual contents of equality law and taken up the concrete problems to be met if a single body for a more or less unified equality law is to be adopted.

The Nordic Council of Ministers has commissioned the Nordic Gender Institute (NIKK) to produce a report on recent and ongoing reforms of equality law in the Nordic States. The report will be published and Nordic equality policies discussed in a co-Nordic workshop, arranged by the Finnish Ministry of Social Affairs and Health in Helsinki in June.

Case law national courts

Twenty years of legal uncertainty was finally resolved when the Supreme Administrative Court decided in February that the Act on Equality between Women and Men (609/1986) must be applied when nominating priests to the offices of the Lutheran Church.[24] The Act on Equality provides an exception to the prohibition of sex discrimination under the Act as far as religious practice is concerned. Already in 1986, the same year that the Equality Act was enacted, the Lutheran Church of Finland opened ministerial offices to women, and consequently, at least in principle, the Equality Act became applicable in most situations concerning church practice. Until recently, the Lutheran Church has tried to avoid open conflicts between proponents and opponents of women being ordained to the priesthood by trying to arrange church rituals so that an opponent would not be required to perform church rituals together with a woman. Some religious groups within the Church have steadfastly supported male priests who refuse to cooperate with women, and they have found some legal support. For example, in January 2008 a doctoral dissertation which argued for the right of a priest to refuse to perform church rituals with a woman was accepted by the Faculty of Law of the University of Lapland.[25] The author (a minister and now a legal scholar) claimed that the church chapters and Supreme Administrative Court have

[24] Supreme Administrative Court KHO: 2008:8. http://www.finlex.fi/fi/oikeus/kho/vuosikirjat/2008/200800181, accessed 29 February 2008.

[25] *Arto Seppänen (2008), Tunnustus kirkon oikeutena. Acta Universitatis Lapponiensis 129.*

overridden the conscientious refusers' religious rights by administrative arguments, and not given due consideration to confessional religion in the issue. Indeed, such arguments were not heeded by the Chapter of the See of Turku when it decided in 2006 that an applicant for the office of vicar who refused to perform religious rites with a woman colleague lacked the necessary requirements for the office. The Bishopric Chapter was strengthened in its decision by an earlier unanimous decision by the Bishop's meeting. The applicant claimed before the Administrative Court of Turku that the Equality Act was not applicable to the religious activities of the Church, and that women's right to enter the priesthood is a matter of freedom of religious conscience. The Administrative Court of Turku dismissed the Case. In its decision in February 2008 the Supreme Administrative Court upheld the decision of the lower court. According to the Supreme Administrative Court, a vicar is the head of the congregation and performs the rites as an official of the Lutheran Church. The issue of constitutional protection for the freedom of religion does not arise in this context because the Act on the Lutheran Church and the Church Order do not allow a church official to refuse, on religious grounds, to perform tasks that pertain to the office. The Act on Equality requires that male and female Lutheran ministers are not treated differently on the ground of sex, but the exception in the Act concerning religious practice remains valid for other religions which do not themselves allow women to enter religious offices. Legally speaking, the matter should now be settled. It remains to be seen whether some religious groups will leave the Lutheran Church as a result of the decision. On the other hand, the Church could no longer face open opposition in the matter without losing members who stand for women's religious rights and were becoming seriously dissatisfied with compromises concerning this issue.

FRANCE – *Sylvaine Laulom*

Policy developments

In the current French context, several elements reveal an increasing interest in gender issues. Firstly, the number of cases on discrimination brought before the courts is increasing. Lawyers, judges and legal literature are becoming more familiar with the instruments of discrimination regulation and this will influence sex discrimination. Secondly, the High Authority against Discrimination and for Equality, which is a new independent administrative body created at the end of 2004, has already demonstrated that it is going to play a very active role in the fight against discrimination. Even if sex represents only 6 % of the claims brought before the HALDE, the HALDE has made some interesting recommendations. Although these recommendations are not legally binding, they are usually accepted. Finally, social partners now seem more interested in negotiating on sex discrimination. Law No 2006-340 of 23 March 2006, on Equal Pay between men and women, aims to reduce the wage disparities between men and women by strengthening the obligation to negotiate on wages. The law specifies that the pay gap between men and women must disappear before 31 December 2010 and leaves it to the social partners to find the means to reduce these wage disparities. Even if until now the number of collective agreements concluded is still rather low, social partners at enterprise level (companies with more than 50 employees) and/or at branch level have to negotiate on that issue. For this reason, some enterprises have been setting objectives for the recruitment and the promotion of women in order to improve the balance between men and women, or for a revision of job classifications.

Some enterprises have also been setting objectives to reduce wage disparities, for example to identify any existing discrimination and offer compensation.

There is another recent initiative to be reported. In April 2008, the Ministry of Labour presented a 'Charter on Parentability in Enterprises'. One of the aims of the Charter is to promote reconciliation between the work and private lives of workers/parents and to promote equal treatment between men and women. A total of 30 enterprises have signed the Charter, but its content is rather weak and it is only a recommendation and not a legally binding agreement.

Legislative developments

New Anti-Discrimination Act to implement the EC directives

A new Anti-Discrimination Act is under discussion in Parliament. The aim of the proposal is to complete the implementation of all relevant EC directives on discrimination including Directive 2002/73/EC amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services and Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (as amended). The new law will introduce into French law the definition of direct and indirect discrimination in accordance with the definition provided by the Directives. Up until now, French legislation has not contained any legal definition thereof, and it has been up to the courts to apply the European definition. The law will redefine the notion of harassment, in accordance with the Directive. The proposal includes 'the instruction to discriminate' in the prohibition of discrimination. It implements the principle of equal treatment in access to and the supply of goods and services, but allows different treatment in the provision of goods and services when the latter are targeted exclusively at men or women, if this is justified by a legitimate aim and the means to achieve it are appropriate and necessary.

The aim of the proposal is explicitly to take into account the observations of the European Commission on the French situation and to implement the various directives on discrimination. However, the proposal could create some problems of coordination with regard to the existing provisions of the Labour Code that have not been modified. For example, the proposal redefines the notion of harassment, in accordance with the Directive, but it has not repealed the existing definition. If there is no modification, there will be two different definitions of harassment under French law.

After the discussions in the Senate, a new article has also been introduced in the proposal. It does not directly concern the implementation of the Directives as does the remainder of the proposal, but it is a very important answer to a debate created by another proposal. To date, a time-limit of 30 years has been in place for bringing a non-discrimination claim. A proposal not dealing specifically with discrimination issues, but with civil claims in general, intends to reduce the time-limit for civil actions in general from 30 years to 5 years. The very negative effects of this proposal on discrimination claims have been strongly criticized by some MPs, trade unions and other lawyers' organisations. The President of HALDE (the French High Authority for combating discrimination and for equality), Louis Schweitzer, has expressed his concern about the proposal and has said that HALDE's recommendation is to ask for the time-limits to remain unchanged. Thus the Senate has proposed to introduce a specific

article dealing with the time-limits for bringing a non-discrimination claim. If adopted, it will considerably reduce the negative impact of a general reduction in the time-limit for civil actions concerning discrimination claims. The time-limit will be effectively reduced to five years, but it will start to run when the discrimination is discovered (which can, of course, be many years after the discrimination actually started). Moreover, the damages granted should compensate the entire discrimination whatever its length may have been. Thus, for example, if discrimination in wages has taken place for more than five years, it should be entirely compensated.

Case law

Two decisions of the *Cour de cassation* show the willingness of the French Court to apply the European principles on equal treatment.

Age limits in recruitment

The first one[26] dealt with a specific provision of the RATP (Paris Regional Transport Authority) Staff Rules and Regulations which stipulates an upper age limit of 35 years for new recruits. However, some exceptions do exit: the upper limit does not apply to certain categories of women: widows, divorced women who have not remarried, mothers with three or more children, single mothers with at least one dependent child and a need to work. This age limit was opposed by Mr X who took the view that he was the victim of sexual discrimination contrary to Community law. By directly applying 'the European principle of equal treatment between men and women' as defined in Article 141 EC and the 76/207/EEC Directive, the *Cour de cassation* decided that the regulation was discriminatory. Implicitly referring to a positive action, the RATP maintained that the exceptions were justifiable as they were aimed at promoting the employment of women in a difficult familial situation. For the *Cour de cassation*, as the regulation gave an automatic and unconditional priority to women without taking into account the situation of men in the same familial position as women, it was discriminatory. It is possible to see here the influence of the European case law on positive action on the *Cour de cassation's* reasoning. In the *Briheche* case (C-319/03) the ECJ had already held that a national provision which reserves the exemption from the age limit for obtaining access to public-sector employment to widows who have not remarried and who are obliged to work, thereby excluding widowers who have not remarried and who are in the same situation, is discriminatory. The *Cour de cassation* has here clearly followed the ECJ's decision. More generally, these age limits for recruitment which are still found in some public enterprises like the RATP, but also at the EDF-GDF (the French national electricity and gas company) or the SNCF (French Railways), should soon disappear as they are also clearly discriminatory on an age basis (see the High Authority against Discrimination and for Equality, HALDE Annual Report).

Dismissal of a pregnant woman

The second case[27] dealt with the dismissal of a pregnant woman. Here again the Court explicitly referred to Directive 92/85/EEC. Article L.122-25-2 of the Labour Code prohibits the dismissal of pregnant women, save in cases of serious misconduct. For the Court this article should be interpreted in the light of the Directive and it implies

[26] Cass. Soc. 18.12.2007, No 06-45132.
[27] Cass. Soc. 18.04. 2008, No 06-46119.

that judges must determine that the serious misconduct is not connected with the pregnancy.

Equality body decisions

Two deliberations can be mentioned here.

Gender reassignment and sex discrimination
The first one concerns discrimination based on transsexualism.[28] A worker was dismissed just after he told his employer of his intention to undergo gender reassignment surgery. Referring to Directives 2006/54/EC and 2002/73/EC and to the Cornwall County Council judgment,[29] HALDE stated that discrimination based on transsexualism is discrimination on the ground of sex and is prohibited by the European Directive.

Wage discrimination
The second concerns wage discrimination.[30] HALDE concluded that a woman was being paid less than men while she was doing the same job, thus it clearly revealed a case of discrimination and that the employer could not objectively justify the difference in treatment. In both cases, it is now up to judges to determine the existence of discrimination.

GERMANY – *Beate Rudolf*

Policy developments

After the enactment of the General Law on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*) in 2008, which implements all European anti-discrimination directives, the focus of policy developments concerning gender equality in Germany has shifted to the issues of reconciliation of work and family life, in particular child care and caring for elderly relatives. In contrast, the federal Government and the legislator demonstrated less activity with respect to realising substantive gender equality through other measures independent of women's family obligations. While they introduced a specific programme for promoting women as tenured university professors, they neither took any action in the other sectors of public employment nor did they act upon the call by women's organisations to increase the representation of women on boards of listed companies.

As the next general elections on the federal level will be in the autumn of 2009, the time for further policy developments is becoming scarce: It is generally assumed that no major legislative initiatives will be taken after the summer break of 2008. For this reason, it is to be expected that the gender-discriminatory effects of the income tax law will not be dealt with any time soon.

Day care
The Federal Ministry for the Family, Senior Citizens, Women, and Youth (*Bundesministerium für Familie, Senioren, Frauen und Jugend, BMFSFJ*) produced a first

[28] Deliberation No 2008-29 of 18.02.2008.
[29] Case C-13/94 *P.* v *S and Cornwall County Council* [1996] ECR I-02143.
[30] Deliberation No 2008-31 of 18.02.2008.

draft of a law concerning children aged under three years in day-care institutions (*Entwurf eines Gesetzes zur Förderung von Kindern unter drei Jahren in Tageseinrichtungen und in der Kindertagespflege, Kinderförderungsgesetz –KiFöG*), which aims to improve the reconciliation of work and the family. The draft is an internal document, but the main points have been made public following an agreement between the coalition parties of the Federal Government. It introduces, *inter alia*, a legal claim for parents to have access to day-care for their child starting from the age of one year. Parents who choose not to have their children (aged between one and three years) looked after in a day-care institution will receive a care allowance (*Betreuungsgeld*). These provisions shall come into effect on 1 August 2013.

Although the creation of more day-care facilities has long been demanded by women's organisations, social experts, and politicians alike, it is doubtful whether the law will meet its purpose. In particular in low-income families, the care allowance will create a strong incentive for one of the partners – usually the mother – to remain at home. It thus helps to perpetuate the traditional family model instead of permitting parents to have a free choice. Moreover, it also places children from low-income families, often migrants, at a disadvantage because research shows that their integration into society and their opportunities in later life depend on language skills that are best acquired in early childhood education.

Promotion of tenured female university professors

The Federal Ministry for Education and Research (*Bundesministerium für Bildung und Forschung, BMF*) and the *Länder* launched a programme to promote female professors in German universities.[31] As a means to increase the number of female professors on tenured professorships (where they presently only amount to 15 %), the programme will finance 200 positions during the coming five years. The decision to grant the available funding to a university depends on an evaluation of its overall programme for promoting women. The budget for the programme has been set at EUR 150 million.

Stock-taking concerning the promotion of gender equality in the public sector

The Federal Parliament (*Bundestag*) discussed the report of the Federal Government on its experience with the Federal Law on Equality (*Bundesgleichstellungsgesetz*) for the period 2001-2004.[32] Parliament did not decide to introduce any new measures, although the law has not attained its aim of realising the equal representation of men and women on all levels (the number of women in decision-making positions has not increased, women still constitute 91 % of part-time workers, only 3 % of family leave is taken by men).

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[31] Agreement between the Federation and the Länder on a Programme Promoting Female Professors (*Bund-Länder-Vereinbarung über das Professorinnenprogramm*) of 10 March 2008, http://www.bmbf.de/foerderungen/12320.php, accessed 25 April 2008.

[32] Documents of the Federal Parliament (*Bundestags-Drucksache*) 16/3776, http://dip.bundestag.de/btd/16/037/1603776.pdf, accessed 25 April 2008.

Legislative developments

The federal legislature adopted the Law on Family Care Time (*Pflegezeitgesetz*).[33] It introduces the right to unpaid leave during up to six months for employees who are caring for a close relative. During the time of leave, employees keep their social security cover and are guaranteed to be able to return to their place of work. Employers who employ fewer than 15 employees are exempted from this provision. All employees have the right to ten days' unpaid leave so as to be able to gather information on and organize care services for close relatives. The dismissal of employees who make use of either of the two possibilities is prohibited. This law aims to improve the reconciliation of work and family life. However, it does not contain any incentives to ensure that both partners share family responsibilities.

Case law national courts

The question of whether women in the public service may wear an Islamic headscarf continues to preoccupy the German courts.

Higher Administrative Tribunal (Verwaltungsgerichtshof) of the Land of Baden-Wurttemberg, decision 4 S 516/07 of 14 March 2008

The Higher Administrative Tribunal (*Verwaltungsgerichtshof)* of the Land of Baden-Wurttemberg decided on the case of a teacher in an elementary school who was a Muslim and has been wearing a cap fully covering her hair and her ears for about nine years. The school authorities ordered her to remove the cap on the ground that it violated the Land's obligation of neutrality in religious matters although there had not been any complaints from children or parents. The Tribunal ruled that an 'abstract danger' of a conflict between children/parents and the teacher, which would endanger the Land's religious neutrality, is a sufficient reason for a prohibition. Moreover, it considered irrelevant the fact that nuns are allowed to teach classes in their habit because this was their 'professional outfit' and reflected the Christian-occidental culture, which the applicable law specifically declares not to endanger the Land's neutrality.

State Labour Court (Landesarbeitsgericht) Düsseldorf, decision 5 Sa1836/07 of 10 April 2008

Before the Labour Court (*Landesarbeitsgericht*) of Düsseldorf (for the *Land* of North-Rhine Westphalia) was the case of a Muslim social educationalist who worked in a comprehensive school (*Gesamtschule*). For religious reasons, she had been wearing a beret fully covering her hair and ears for almost twenty years, including the whole time she had been working in state schools. The school authorities then ordered the teacher to remove her beret after an amendment of the school law in 2006 prohibiting school staff from wearing religious symbols. The Court held that, after weighing the teacher's right to religious expression and the students' negative freedom of religion, i.e. the right to be free from the religious expressions of others, the latter prevailed. It also found no violation of the prohibition of discrimination under the General Equal Treatment Law (*Allgemeines Gleichbehandlungsgesetz*) because the different treat-

[33] Documents of the Federal Parliament (*Bundestags-Drucksache*) 16/7439 and 16/7486, http://dip.bundestag.de/btd/16/074/1607439.pdf, and http://dip.bundestag.de/btd/16/074/1607486.pdf, accessed 25 April 2008. The law was adopted by the *Bundestag* (Federal Parliament) on 14 March 2008, and by the *Bundesrat* (Council of States) on 25 April 2008. It will enter into force on 1 July 2008, provided the Federal President (B*undespräsident*) signs it into law.

ment was justified by occupational requirements, in particular the Land's educational obligations.

Both decisions raise the question of whether the requirement of a mere 'abstract danger' to school peace is fulfilled in a situation where the teacher had not been wearing a headscarf, but a cap, so as to better blend in with the fashion mainstream and to avoid any impression of an intention to proselytise. In the light of the state's constitutional obligation of tolerance and its concomitant obligation to teach tolerance in schools, it can well be argued that qualifying the teacher's conduct as creating an abstract danger to peace at school is going too far. Moreover, the Land's neutrality arguably prohibits it from 'defining away' the religious character of nuns' habits, so that the first case also reveals religious discrimination. Since both cases raise questions of the interpretation of the famous 'headscarf decision' of the German Federal Constitutional Court (in 2003), it is to be expected that the parties will avail themselves of all legal remedies, so that they will probably end up before that Court in the end.

Federal Labour Court (Bundesarbeitsgericht), decision 8 AZR 257/07 of 24 April 2008

The Federal Labour Court had to decide on the extent of an employee's burden of proof when she claims damages for discriminatory non-promotion. A pregnant female employee had not been promoted. She claimed that the employer knew of her pregnancy, and that he tried to console her by telling her that she should look forward to having her baby. Moreover, she claimed that she had been her superior's deputy (in the case of illness or vacations), and that he had held out the prospect that she would succeed him. The Court held that the claimant had met her burden of proof under § 611a of the Civil Code (*Bürgerliches Gesetzbuch, BGB*). It emphasised that the employer's knowledge of the pregnancy is not sufficient to make a *prima facie* case of discrimination, but that the claimant must show additional facts. It further held that the facts adduced by the claimant were such additional facts, and that the requirements for such additional facts must not be rigid. The case was therefore remanded to the lower court.

The decision is convincing: The shifting of the burden of proof presupposes that the claimant had shown facts that lead to the conclusion that there had been discrimination. Yet there is no general rule that employers discriminate against women once they are pregnant. However, since *de facto* women still bear most of the responsibilities for bringing up children, the stereotype is still widespread that a mother cannot fulfil her job as well as a childless person. Consequently, for making a *prima facie* case of discrimination, one must show facts that permit the conclusion that the employer has this stereotype in mind when taking the decision not to promote a pregnant woman. These are the additional facts required by the Court. As the stereotype is widespread, it is convincing that the Court set a low threshold for such additional facts.

Miscellaneous

On 15 April 2008, women's NGOs carried out the first 'Equal Pay Day'.[34] Its aim was to raise awareness of the persistence of a considerable gender pay gap in Germany, and to stimulate dialogue between the social partners.

[34] http://www.equalpayday.de, accessed 25 April 2008.

GREECE – *Sophia Koukoulis-Spiliotopoulos*

Policy developments

In Greece, gender equality and related issues, in particular maternity protection and the reconciliation of family and work, the latter in conjunction with the necessity to cope with the acute demographic deficit, are often the subject of political and social discourse. Moreover, Greek courts have recently rendered some landmark decisions regarding the right of men and women to the reconciliation of family and work – or rather to their 'harmonization', as the Council of State (the Supreme Administrative Court) very pertinently terms it.[35]

However, although parental leave and other measures aiming at facilitating the 'harmonization' of family and work increasingly concern men and women, the stereotype that this is mainly a woman's issue still survives.

A serious impediment to the promotion of gender equality is the low level of relevant litigation and complaints, as compared to the extent of actual gender inequalities and discrimination, which mostly affect women. Lack of information and support, and the socio-economic context, which is marked by high female unemployment and the persistence of stereotypes concerning the role and capacities of women,[36] coupled with the fear of acquiring a 'bad name' in the labour market, make women reluctant to claim their rights. Furthermore, women are often unable to prove their case, as crucial evidence either does not exist or is in the possession of their employer. Possible witnesses are as reluctant to come forward as the victims of discrimination, for the same reasons. Thus, gender discrimination victims often cannot benefit from the very effective remedies and sanctions traditionally applied by Greek courts.[37] Community rules on the shifting of the burden of proof and on the possibility for organisations to bring aggrieved workers' cases before courts and other competent authorities (*locus standi*) are highly effective means to cope with this deplorable situation, provided that they are properly transposed and applied, which unfortunately is not the case in Greece. We will briefly deal with this problem.

Legislative developments

The rules relating to the shifting of the burden of proof in favour of the complainant (Article 4 of Directive 97/80/EC),[38] as well as the requirements under Directive 2002/73/EC[39] regarding the *locus standi* of trade unions and other organisations for bringing aggrieved workers' cases before the courts and other competent authorities, have been transposed in a way that failed to create the legal certainty required by the

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35 Council of State judgments Nos 3216/2003 (Plen.), 1 and 2/2006, see *Bulletin on Legal Issues in Equality*, Nos 3/2004, 2/2006 and 1/2007, available at http://ec.europa.eu/employment_social/gender_equality/legislation/ bulletin_en.html, accessed 15 June 2008.

36 Cases C-158/97 *Badeck* [2000] ECR I-1875, para. 21; C-409/95 *Marschall* [1997] ECR I-6363, paras 29, 30.

37 See S. Koukoulis-Spiliotopoulos 'Gender equality in Greece and effective judicial protection: issues of general relevance in employment relationships' *Neue Zeitschrift für Arbeitsrecht* Beilage 2/2008, pp. 74-82.

38 Council Directive 97/80/EC on the burden of proof in cases of discrimination based on sex, OJ L 14, 20.1.1998, p. 6.

39 Directive 2002/73/EC of the European Parliament and the Council amending Council Directive 76/207/EEC, OJ L 269, 5.10.2002, p. 15.

ECJ[40]. Regarding the burden of proof, although modifications to the Code of civil procedure and the Code of administrative procedure were necessary, as the Council of State had recommended,[41] the provisions of Directive 97/80 were merely copied in Decree No 105/2003, with the result that the Community burden of proof rule remains virtually unknown to judges, lawyers, workers and trade unions. It is indicative that in *Nikoloudi*, in which one of the preliminary questions posed by a Greek court concerned the burden of proof, all those intervening before the ECJ invoked the Directive with the exception of the Greek claimant.[42] The same inadequate method of transposition was repeated in Act 3488/2006, regarding both the burden of proof rule and the *locus standi* rule, so that the latter also remains virtually unknown. This same method had also been applied one year earlier regarding the same rules in Act 3304/2005, which transposed the two anti-discrimination Directives.[43]

Since these rules may be seen as acting counter to well-established national principles and, consequently, they may continue to be ignored, they must be clearly formulated and incorporated into the procedural codes, concerning both gender and other grounds of discrimination. Moreover, judges, lawyers and trade unions must be informed about the content and scope of these rules according to EC law and ECJ case law. In any event, the courts must apply these rules, even *proprio motu,* without waiting for their proper transposition.[44]

Case law national courts

Characteristic examples of the problems created by the traditional procedural rules, which give the complainant the burden to prove all of his/her allegations, are sexual harassment cases. Very few such cases are brought to court, or even to the labour inspectorate, and most of them fail due to a lack of evidence. Moreover, defendants often use a highly effective weapon against the claimant or potential claimant who complains in the workplace or elsewhere, and against his/her witnesses or potential witnesses: they neutralize them by suing them for slander, libel or insult. In a typical case of this kind, the claimant won in the First Instance Court; the defendant appealed the decision before the Court of Appeal while simultaneously suing the claimant's witness in the First Instance Penal Court. This witness's testimony was the sole proof of the harassment, and when the First Instance Penal Court found him guilty of slander, the case failed in both the Court of Appeal and the Supreme Civil Court, in spite of significant *prima facie* evidence, which the Court of Appeal ignored.[45] The ECJ judgment in *Nikoloudi* does not seem to have encouraged the application of the burden of proof rule in other cases. Thus, the situation remains unchanged.

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40 See e.g. ECJ Case C-187/98 *Commission* v *Greece* [1999] ECR I-7713.

41 Council of State Opinion No 348/2003 on the legality of the draft Decree transposing Directive 97/80.

42 Case C-196/02 *Nikoloudi* [2005] ECR I-1789, AG Chr. Stix-Hackl, para. 66.

43 Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, p. 22 and Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16.

44 See Case 109/88 *Danfoss* [1989] ECR 3220, para. 14, where the ECJ called upon Member States – hence upon all their authorities, including the courts – to make 'adjustments to national rules on the burden of proof'.

45 Athens Court of Appeal judgment No 5789/1998; Supreme Civil Court judgment No 1655/1999.

HUNGARY – *Csilla Kollonay-Lehoczky*

Policy developments

Gender equality is far from being focused upon in current Hungarian politics. The basic approach is that equal opportunities for women are more or less guaranteed, especially in comparison with the 'two other minorities' (treating gender equality as one of the minority issues). The situation of women is certainly less pressing in comparison to that of Roma and the disabled. The low economic activity rate of the working-age population (55.1 % for women, 69.0 % for men and 61.9 % for the total population in 2007) [46] is the subject that is occupying policy makers.

There are many benevolent initiatives, campaigns and various events; however, events pass by and initiatives, tenders and projects fade away without any apparent or tangible result regarding a decrease in or the elimination of existing inequalities. The underlying reasons might be connected with a lack of commitment or endurance, as well as objective limits to possibilities both on the side of the public administration as well as on the side of civil or professional organisations. An improvement in the administration of tenders and projects as well as in their financing methods might bring more traceable results. Public media (and even politicians) frequently use language that perpetuates stereotypes without any legal opportunity to correct this. (E.g. recently, the issue of parental leave has been frequently addressed; on such occasions speakers consistently talk about 'mums' or 'young mums' as a relevant group, thereby confirming stereotypes and neglecting the fact that this leave has already been available for fathers for more than two decades.)

The Equal Treatment Authority and, at its behest, a project on the 'Fight against discrimination – shaping the social attitude' are featured among the priority projects within the framework of the New Hungary Development Plan: the Operational Social Renovation Programme, that might be supported by European funding (under the European Regional Development Fund, the European Social Fund and the Cohesion Fund).[47] The results, especially with regard to gender equality, are still to be seen.

Legislative developments

In April, Act XVII of 2008 repealed ILO Convention No 45 on the prohibition on employing women in any underground mining with reference to case C-203/03 (*Commission of the European Communities* v *Republic of Austria*).

Besides this step, no further legislative developments concerning gender equality or equal opportunities for both sexes have taken place in the first four months of 2008. Developments in three areas in the previous year deserve to be mentioned.

Amendments to the laws regulating the activities of financial institutions

October: Act CXVII of 2007 on occupational pensions was adopted in order to fully comply with Directive 2003/41/EC.[48] (This Act was later amended on the basis of the laws adopted in November, see below.)

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[46] *Gazdasági és Szociális Adattár* (Economic and Social Data Collection) – 2008, ed. by E. Hanti OFA-FSZH, Budapest, 2008 p. 58.

[47] Governmental Resolution No 1014/2008 (III.11) *Korm. hat.*

[48] Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision, OJ L 235, 23.9.2003, pp. 10–21.

November: Act CXXXVII of 2007 on the 'amendment of certain laws on financial services with a view to their harmonisation with EU law' was adopted. These provisions were the only ones which were aimed at the transposition of Directive 2004/113/EC.[49] The amendments, while emphasising the equal treatment principle, permit the use of sex-based differentiation in the calculation of premiums and benefits for the purposes of insurance and related financial services if the proportionate premiums and benefits are based on risk groups and sex is, on the basis of relevant and accurate actuarial and statistical data, a determining factor in the assessment of risk when calculating premiums and benefits. This permitted exception can be applied in spite of the fact that Hungarian law previously contained no provision permitting any departure from unisex actuarial calculation. On the same day Parliament adopted Act CXXXV on 'State Inspection of Financial Institutions', which establishes the duty for the Inspectorate to report to the Commission of the European Union all cases reported regarding sex-based actuarial calculations, the risk assessment and related data as well as the sources where they are published.[50]

Changes in family law – registered partnership

Act CLXXXIV of 2007 on registered partnership – effective from 1 January 2009 – makes it possible for unmarried partners upon a declaration made before the registrar, to enjoy most of the rights guaranteed to spouses and to married couples. Thus – unless the law exceptionally determines otherwise – the legislation on marriage is to be applied to registered partnership, the rules on spouses are to be applied to partners, the rules on married couples to registered partners, the rules on widows or widowers to surviving partners, and the norms on divorced persons to persons whose registered partnership has been officially terminated. The new law does not make a distinction between homosexual or heterosexual registered partners. The new law has eliminated a number of situations of uncertainty and social and financial insecurity that in the past mainly disadvantaged women living in a partnership.

Some changes in the field of criminal law (that may have an impact on the social and economic status of women)

Criminalisation of harassment

The amendment to the Criminal Code[51] has officially inserted the new crime of 'Harassment' into its title on 'Crimes against freedom and human dignity'. The recent frequency and the ways of perpetrating this crime have justified the enactment of a *sui generis* crime in addition to the former and milder ways of protecting the privacy of individuals. Harassment now means either regular or continuous hounding with the aim of threatening or intruding into the private life of a person, or threatening a person or the person's relative with the commitment of a crime. More serious punishment is applicable if the harassment is committed against a previous spouse or partner or against a person under the care or custody of the offender.[52] This gave rise to some

[49] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004, pp. 37–43.

[50] Article 10(1)(p.) of Act CXXXV of 2007.

[51] Act CLXII of 2007 on the Amendment of Act IV of 1978 on the Criminal Code of Hungary.

[52] Article 176/A of the Criminal Code, applicable from 1 January 2008.

hope that the slow and inefficient steps in preventing domestic violence[53] might be given some impetus by the enactment of this crime. The crime can only be prosecuted upon a private initiative, i.e. upon a claim by the victim.

Confidential data collection concerning (organised) sexual crimes
Act CLXXXIII of 2007 amending the Code of Criminal Procedure extended the opportunity to collect confidential data, subject to preliminary judicial permission, to crimes such as trafficking in human beings, the misuse of prohibited pornographic recordings, pimping or soliciting even if the applicable punishment does not exceed three years imprisonment.[54]

Case law national courts

Equality litigation, especially on gender equality, remains relatively low. In 2008 there are so far no published decisions by the national courts on gender equality. Two decisions from 2007 deserve to be mentioned.

Terminating the employment of a pregnant temporary agency worker due to sick leave
The prohibition on the termination of employment is not applicable in the case of temporary agency workers under the Labour Code. On the other hand, termination is only permitted for reasons enumerated in the Labour Code. One of the permitted reasons is being unable to do the work . A female employee who, as a result of fixed-term contracts, had been employed for an unlimited period as a technical operator took sick leave due to pregnancy. After about two months of absence the employer dismissed her due to being 'unable' to do the work. The employee took the case to court and the second instance court, as well as the Supreme Court, invalidated the dismissal. It was established that during a period when the employee is exempted from work due to sickness, an 'inability' to do the work cannot be established. 'Inability' has to be based on aptitudes and abilities related to the particular job. The employer, by merely referring to the (temporary) inability of the employee, had failed to prove such 'inability'. Albeit the second instance court also mentioned that the case concerned aspects of discrimination (since the employer knew about the pregnancy), the Supreme Court did not address this issue due to procedural reasons (because it had not been raised by the plaintiff earlier).[55]

The withdrawal of an appointment to an executive position due to maternity – Court reviews and approves the decision of the Equal Treatment Authority
A national public administration agency withdrew the senior executive appointment of a woman who took child-care leave. After a complaint by the employee the ETA imposed a fine of HUF 1.5 million (about EUR 6 200). The defendant employer took the case to court, where it tried to justify its measure by referring to the provisions of the Act on the Status of Public Servants which permits the withdrawal of executive appointments. However, the Court found that the temporary replacement of the absent employee in question would have been possible in this case. Furthermore, it

[53] See *Bulletin on Legal Issues in Equality*, No 3/2006, available at http://ec.europa.eu/employment_social/gender_equality/docs/2006/bulletin06_3_en.pdf, accessed 3 June 2008.
[54] Article 201(1) of Act XIX of 1998 on the Code of Criminal Procedure as amended by Act CLXXXIII of 2007, Article 4.
[55] *Legf. Bír. Mfv. I.* 20.810/2005, *Bulletin of Court Decisions*, No 96.2007.

was also proved that the withdrawal of such appointments for public servants taking child-care leave had been the practice as far as this employer was concerned. On the same grounds as the decision of the ETA, the decision was upheld.[56]

Equality body decisions/opinions

No significant decisions on gender equality have been published in 2008.

ICELAND – *Herdís Thorgeirsdóttir*

Introduction

Given the increased specialized knowledge in gender equality and the institutionalised gender equality 'machinery', recent progress is below expectations. There hardly is any gender equality litigation in Iceland. The last case dealt with by the Supreme Court was in November 2006, concerning an appointment within the Church of Iceland, which was in breach of the Gender Equality Act.[57] Cases that reach the Complaints Committee on Gender Equality mostly concern alleged discrimination in access to employment. The rulings of the Complaints Committee, which are now binding, have confirmed in the majority of cases during the last one or two years that there was no breach of gender equality law, which is not encouraging for those seeking justice. The topics mostly discussed in relation to gender discrimination concern domestic violence, while more subtle forms of discrimination like harassment when linked to the sex of a person do not seem to attract attention to the gender discriminatory aspect. The gender-based pay gap has remained the same in Iceland for more than a decade and women are still a minority within the political and economic establishment.

Legislative developments

A new Gender Equality Act was passed by the *Althing* on 26 February 2008, replacing the previous act No 96/2000. The main novelties in the new Gender Equality Act are the following:
– The guarantee given by the Centre for Gender Equality to monitor the implementation of the Act is stronger and more explicit, enabling the Centre to impose a daily fine in certain instances in order to enforce the law.
– The substantiated opinions issued by the Complaints Committee on Gender Equality will be legally binding for all parties. New rules concerning the Complaints Committee proceedings have been adopted.
– The proportion of the representation of each sex must not be lower than 40 % in public committees, boards and councils if more than three members are appointed.
– A plan is to be added to the mandatory programme, stating that companies and institutions employing more than 25 people must prepare matters of equality, listing the manner in which employees will be guaranteed the rights provided for in the Gender Equality Act.

[56] Court of the Capital City, 1. K. 31541/2007/4.
[57] No 95/2000.

– The equal status consultants within the ministries of government will be experts on equal rights.
– The Minister of Social Affairs is to summon a conference on gender equality within a year of the parliamentary elections and again after two years with the purpose being to encourage a general debate on gender equality issues among the public on various levels of society.
– The Minister of Social Affairs is to present to the National Assembly, within one year of the parliamentary elections, a motion for a parliamentary resolution on a four-year programme on matters of equality, the first one to take effect in the autumn of 2008 and be valid until 2012.
– The Minister of Social Affairs will be in charge of developing a special verification system for the implementation of equal pay and the implementation of equality in employment and dismissals in cooperation with the parties in the labour market.
– Consistent with Government policy, individuals now have the right to disclose their salaries if they so wish. Article 19 of the new Act states that employees shall at all times be permitted to reveal their wage terms if they choose to do so. The explanatory notes to the Act state that this is in accordance with the policy statement of 23 May 2007 by the present Government, which declared the intention to ensure that workers would have the right to reveal their wages and terms of employment if they choose to do so. This is also in accordance with what has been expressed by the vast majority of those who have given comments to the Review Committee: that secrecy about wages and terms of employment would militate against the achievement of the aims of the Gender Equality Act. The notes to the Bill also mentioned that a report by the market-research company Capacent Gallup on wage structures and gender-based wage differentials, dated October 2006, revealed that the unexplained gender-based wage differential stood at 15.7 %. According to the survey, many people considered that these differentials thrived better in an atmosphere of secrecy surrounding wages, and that secrecy fuelled wage discrimination by making it easier for managers to favour certain employees on a basis other than that of their professional qualifications and competence.

Policy developments

In the autumn of 2007, the Ministers of Social Affairs and Finance appointed three working groups to seek ways of putting the Government's policy on wage equality, as described above, into practice. To begin with, the Minister of Finance appointed a working group to handle equality issues in the public sector. Its main task is to present a strategy on how to reduce unexplained gender-based wage differentials in the public sector, the aim being to cut them by half during the electoral period, and to make proposals on a special review of the wages of women working for the state, particularly in occupations where they are in the overwhelming majority. Secondly, the Minister of Social Affairs appointed a working group to address equality issues in the private sector. The main task of this group is to seek ways of eliminating unexplained gender-based wage differentials in the private sector and achieving a gender balance in representation in committees and councils of institutions and enterprises. It is expected to propose methods intended to be most likely to produce results. Thirdly, the Minister of Social Affairs appointed an advisory team to advise on the progress of the project as a whole; this team is to carry out, or arrange for, an evaluation of the actual results. The chairpersons of the three groups described above form a consultative team for the review of the groups' proposals and the co-ordination of their work.

The Ministry of Social Affairs has, in co-operation with the Centre for Gender Equality and Statistics Iceland, published a brochure 'Women and Men in Iceland 2008',[58] a compilation of gender statistics within various areas. The aim is to shed some light on the situation of gender matters in Iceland. The statistics include information on the percentage of women's income from employment and statistics on positions of influence where the percentage of women is everywhere below 40 %. Women managers of state institutions are barely 12 % in 2008. The ratio of women in official committees and councils is around 18 %. Out of twelve cabinet ministers, four are women.

Results have just emerged from the Tea for Two project of the European Union Community Programme on Gender Equality,[59] a project aimed to promote equal participation of women and men in local politics and governments by analysing the situation and to strengthen the practical municipal work for gender equality awareness of the issue. The results show wide disparities between municipalities with regard to gender equality. Most chief executives in these municipalities are male.[60]

The Association of Local Authorities in Iceland, along with the Ministry of Social Affairs and the Centre for Gender Equality, have produced a translation of the European Charter for Equality of Women and Men in Local Life which will be introduced to all the municipalities in May with the hope that most of them will sign it at the annual congress of the local authorities in September this year.

IRELAND – *Frances Meenan*

Policy developments

The 2007-2013 National Development Plan provides for funding of EUR 68 million in respect of the Gender Equality Programme. The aim is to continue to address the need for measures to improve equality for men and women and to tackle educational and social barriers to women entering and progressing within the workforce with particular focus on disadvantaged women. In addition to promotional delivery, it is intended to progress expenditure on equality proofing, which seeks to identify any unintended negative impacts of policy on any category of persons protected by equality legislation.[61] It should be stated, however, that due to the current economic downturn there are aspects of State funding that are under review. At the launch of the Equality Authority Annual Report 2007 on 24 July 2008, the Minister for State at the Department of Justice, Equality and Law Reform made reference to the fact that there is now a different economic environment and we are faced in the short term with a period of economic and fiscal challenges, of exchequer consolidation and new social realities.[62] Therefore there could be cutbacks in this proposed funding. It is reported that the Equality Authority, the Human Rights Commission and the office of the Data Protec-

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58 http://www.felagsmalaraduneyti.is/frettir/frettatilkynningar/nr/3764, accessed 25 April 2008.

59 http://www.tft.gender.is/default/tft, accessed 25 April 2008.

60 See, for more details, illustrations of the results in maps at this website: http://www.tft.gender.is/default/tft, accessed 25 April 2008.

61 http://www.justice.ie/en/JELR/Pages/Equality_for_Women_Measure, accessed 18 August 2008; http://www.ndp.ie/viewdoc.asp?DocID=1900&mn=&nID=&UserLang=EN&StartDate=1+January+2007, accessed 18 August 2008.

62 http://www.justice.ie/en/JELR/Pages/Address%20by%20Minister%20Moloney%20at%20the%20launch%20of%20the%20Equality%20Authority%20Annual%20Report%202007, accessed 18 August 2008.

tion Commissioner are to be merged into a single agency. This is part of government policy to rationalise the numerous semi-official State agencies and also a cost-saving exercise. The Irish Congress of Trade Unions has strongly criticised this move.[63] The Equality Authority oversees the application of the employment equality and equal status legislation and in practical terms it could mean a reduction of State resources more particularly in the gender area. Apparently the said agencies have been given until mid-September to respond to these proposals.

The Central Statistics Office (the CSO) published the CSO gender report *Women and Men in Ireland, 2007* which examines key differences in the lives of men and women in Ireland. The employment rate for women was 60.3 % in the second quarter of 2007, compared with 45.9 % in 1997. This rapid increase means that Ireland exceeds the EU 2010 target of 60 %. The employment rate for men was 77.2 %, which was well above the average EU rate of around 71.6 %. Women are underrepresented in decision making at both national and regional levels. The 2007 general election resulted in women representing 13 % of MPs in the Lower House (*Dail Eireann*), below the EU average of 23.4 %. In the public service women represented 34 % of members on State boards,[64] 20 % of members of local authorities and 16 % of regional authorities. Almost 80 % of the clerical grades in the civil service are women and 10 % are at Assistant and Deputy Secretary level.

Women comprised almost 80 % of the total workforce in the education and health sectors. Yet women are not well represented in senior positions. For example, in the health service women represented 79.5 % of all staff in 2007, but only 30.6 % of medical and dental consultants.

Ireland had the most gender-balanced population in the EU in 2006, with 100 women per 100 men in the population. For older age groups the proportion of women in the population was higher with 126 women per 100 men in the 65 and over age group.[65]

Legislative developments

The Employment Law Compliance Bill 2008 was published in March 2008. The proposed legislation intends to ensure compliance with employment legislation generally and also sets up the National Employment Rights Authority. The Explanatory Memorandum states that the Bill is intended to benefit lower-paid and other vulnerable employees in particular by securing vindication of employment rights. The Memorandum further states this should have clear benefits in terms of alleviating poverty and preventing exploitation and distortion of competition from non-compliance with employment legislation, and generally improving relations in the workplace. Interestingly, employment equality legislation is not covered by this proposed legislation. Two private member Bills have been introduced in both Houses of Parliament by the

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63 http://www.irishtimes.com/newspaper/frontpage/2008/0724/1216741027971.html, accessed 18 August 2008; http://www.irishtimes.com/newspaper/ireland/2008/0815/1218747922042.html, accessed 18 August 2008.

64 The Government is committed to a programme of achieving 40 % representation of women on State boards and committees. In 2005 the Government decided all nominating bodies should be required to nominate both male and female options for appointments to State boards where they are the responsible authority. All Government ministers were requested to put in place necessary procedures to implement this Government decision. http://www.justice.ie/en/JELR/Pages/Gender_balance_on_state_boards, accessed 18 August 2008.

65 *Industrial Relations News* 4 – 30.01.2008; http://www.cso.ie/releasespublications/women_and_men_in_ireland_2007.htm - 19 Dec 2007, accessed 28 April 2008.

opposition Labour Party in order to provide protection for agency workers, to require the principle of equal treatment to be applied in respect of their employment and the enforcement of such rights.[66]

The Civil Law (Miscellaneous Provisions) Act 2008 came into operation on 20 July 2008, which Act *inter alia* transposed Directive 2004/113 and also amended the Equal Status Acts 2000- 2004.[67]

Case law national courts

Practice and procedure

The Supreme Court[68] held that the Equality Authority had the statutory power to apply to act and, if permitted, to act as *amicus curiae.* That power fell within the scope of the general power of the Authority and was a power to intervene in court proceedings in circumstances where the Authority considered that it could assist the court in reaching a conclusion. This case is a very useful precedent and the question now arises as to whether successful application can be made before the Equality Tribunal[69] to have the Authority act as *amicus curiae* in appropriate cases and especially where the Authority is not in a position to provide representation to a claimant.

Equal pay

There have been a number of equal pay cases mainly in the public sector, for example 13 named male employees[70] (hospital porters/attendants) compared themselves with a named female telephonist/receptionist. Having balanced the demands made of both the claimants and the comparator, the Equality Tribunal considered that the named female comparator carried out work of higher value.

The Health Service Executive (HSE) appealed a recommendation of the Equality Tribunal to the Labour Court which awarded equal pay to 27 named female Directors of Public Health Nursing with 23 named male Directors of Nursing (Mental Health). The Labour Court in dismissing the appeal held that the claimants and the comparators are engaged in like work, the pay determination system which resulted in the difference in pay as between the claimants and the comparators is indirectly discriminatory on grounds of gender, and there is no objective justification for the difference in pay. The claimants are entitled to equal pay with the comparators and to payment of arrears and for the purposes of arrears of pay and equal pay, the claimants are entitled to an amount equal to the bonus paid to the comparators. The Court directed that the HSE put in place a performance bonus arrangement in line with that applicable to the male comparators. As the performance-related bonus scheme could not be applied ret-

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66 Protection of Employees (Agency Workers) Bill 2008 and Protection of Employees (Agency Workers) (No 2) Bill 2008; http://oireachtas.ie/bills, accessed 28 April 2008.

67 http://www.oireachtas.ie/documents/bills28/acts/2008/a1408.pdf, accessed 18 August 2008.

68 http://www.courts.ie/judgments, accessed 28 April 2008 and reported at [2007] 1 IR 246; *Patrick Doherty and Another* v *South Dublin County Council, The Minister for the Environment, Heritage and Local Government, Ireland and the Attorney General, and the Equality Authority, amicus curiae.*

69 Full text of Equality Tribunal decisions are available at http://www.equalitytribunal.ie/index.asp?locID=27&docID=-1, accessed 7 June 2008.

70 *Mr. T.P. Sheridan and 12 Others* v *Health Services Executive – North Eastern Area* DEC – E2008 – 010, .http://www.equalitytribunal.ie/index.asp?locID=139&docID=1745, accessed 7 June 2008.

rospectively the Court decided that the claimants be awarded an amount equal to the average bonus paid to the comparators.[71]

Equal treatment – pregnancy

The Equality Tribunal recently followed *Webb* v *Emo Air Cargo*[72] where an employee was dismissed on the second week of her contract to cover a period of maternity leave when she advised the employer that she herself was pregnant. The respondent had failed to demonstrate that its decision to terminate the claimant's employment was wholly unconnected with her pregnancy. The claimant was awarded EUR 18 000; EUR 16 000 was awarded for distress and EUR 2 000 represented loss of remuneration. The claimant would have probably received a higher award but she obtained alternative employment.[73] In another case, the claimant, an emergency medical technician, advised the Chief Ambulance Officer that she was pregnant. She was removed from operational duties following medical assessment and was offered alternative duties. She carried out the alternative duties for a week and found them unsuitable. She was then placed on health and safety leave in accordance with the Maternity Protection of Employees Acts 1994-2004. The claimant considered that the employer did not explore any suitable employment alternatives in her normal working environment. The equality officer considered that the claimant did not establish a *prima facie* case of discrimination.[74]

Equal treatment - promotion

In a recent case brought on the age ground the Equality Tribunal held that the 'consistory' method of promotion which is used to assess mostly middle-ranking civil servants for promotion must be made 'open and transparent'. In this particular case 'no minutes or other formal record of the meeting was maintained nor was the basis upon which candidates were deemed suitable or unsuitable reduced to writing'.[75] The Tribunal noted that the lack of transparency in the process can create an environment where discrimination can exist. The reasoning in this case is applicable to all grounds of discrimination including gender. Thus it was ordered that should the respondent continue with this method of promotion, that it take immediate steps to ensure that the process is conducted in an open and transparent fashion and that the reasons by which decisions are arrived at are clearly identified.

Equality body decisions/opinions

The Equality Authority held its annual Work – Life Balance Day on 29 February 2008 with numerous events around the country and with the support of all the social partners. *Equality News*[76] has stated that it has committed in its business plan for 2008 to include a range of new initiatives to include the full establishment of an equality

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71 *Health Service Executive* v *Twenty Seven Named Complainants* ADE/07/13, http://labourcourt.ie/labour/labour.nsf/lookuppagelink/homerecommendations, accessed 28 April 2008.

72 Case 32/93 [1994] ECR 1-03567, [1994] ICR 740 (ECJ), [1995] ICR 1021 (HL).

73 *Rabbitte* v *EEC Direct* DEC – E2008 – 007, http://www.equalitytribunal.ie/index.asp?locID=139&docID=1732, accessed 7 June 2008.

74 *Sweeney* v *HSE Midlands Area* – DEC – 2008 – 006, http://www.equalitytribunal.ie/index.asp?locID=139&docID=1731, accessed 7 June 2008.

75 *Fagan* v *The Office of the Revenue Commissioners* DEC – 2008 – 004, http://www.equalitytribunal.ie/index.asp?locID=139&docID=1715, accessed 7 June 2008.

76 Winter 2007/2008 and available at http://equality.ie/publications/newsletters, accessed 28 April 2008.

mainstreaming unit, the provision of support for the Department of Justice, Equality and Law Reform in their review of the grounds covered under the Equal Status Acts 2000-2004, and the development of work on gender stereotyping. The Equality Authority will also prepare its fourth strategic plan which should be submitted to the Minister for Justice, Equality and Law Reform in October 2008.

Miscellaneous

The Labour Court Annual Report was published in March 2008.[77] The Labour Court is the appeal court from the Equality Tribunal. Overall in 2007 there was an increase of 14 cases. Many of the cases cited numerous grounds of discrimination. The Employment Equality Acts 1998-2004 provide for nine grounds of discrimination namely gender, marital status, family status, race, religion, age, disability, sexual orientation and the Traveller ground (people with a shared history, culture and traditions including, historically, a nomadic way of life on the island of Ireland). Of the 38 appeals[78] 19 cases cited the gender ground.

Dr Patrick Hillery, the former Commissioner for Social Affairs, died recently. Ireland's first Commissioner was responsible for the Equal Pay Directive (75/117/EEC). Universally popular he became President of Ireland from 1976-1990.

ITALY – *Simonetta Renga*

Introduction

Gender Equality policies in Italy still have a lot of difficulty taking off as a systematic approach to the problem. Many initiatives and events are promoted by different organisations (public bodies, unions, associations, Equality Advisers) but a general overview is not assured and there is scant interest in gathering, distributing and checking the results.

The previous Government took a little step forward in this direction by introducing the State's yearly Budgeting Act for 2007 which provided for the introduction of gender budget in some sectors of the Public Administration Department. The Ministry for Equal Opportunities was to set the criteria and methods to start the experiment and report to Parliament on the results before 30 March 2009. Before completing this interesting and encouraging experiment, a government crisis led to recent political elections which were won by the opposite centre-right parties.

The very first interventions and press releases of this new Government do not show any specific attention to Gender Equality neither as regards direct measures nor for mainstreaming policies. As yet, both the percentage of women's employment and of their representation in highly qualified and well-paid jobs and sectors is very low and needs some form of support. Moreover, we still suffer from an odd contrast between the tendency to concentrate on maternity as the main field of intervention and a serious insufficient of the structures and services which are useful to employees with care duties.

Gender Equality items are often used by all parties as a 'progressive part' of their programme and quickly downgraded to side issues or even forgotten after the elec-

[77] http://www.labourcourt.ie, accessed 28 April 2008.
[78] This excludes appeals on time-limits.

tions. This also shows the importance of increasing the percentage of women's representation in Parliament.

Policy developments

Women's representation in Parliament

The last political elections of 13 and 14 April, won by the centre-right party, resulted in a very small increase in women's representation in Parliament. Although in the Lower Chamber (where women are more represented than in the Higher Chamber) it increased from 17 % to around 22 %, women's representation in Parliament is still very unbalanced considering that women make up 52 % of the Italian electorate. Blocked lists, where the order of candidates is a determining factor, and the persistent habit of parties (to a differing extent) not keeping their promise to give more opportunities to women in presenting the lists of candidates made the situation worse. Recently, the national Association of Women in Italy (UDI), founded in the 1940s to promote women's conditions and participation in all fields of political and social life, presented a bill on a popular initiative, within a wider campaign, called '50AND50 wherever a decision must be taken'.[79] The Bill provides that a *ratio* of one to one for each sex has to be assured in each list of candidates, or for all candidates of a party when the election concerns single-member constituencies. Lists and parties which do not comply with the requirements mentioned above are not admitted to the election. This will probably be the only way to quickly ensure a balanced representation of women in politics, but it has little chance of being enacted as even more 'moderate' bills have already failed.

Legislative developments

Implementation of the Recast Directive 2006/54/EC

The former centre-left Government passed, as one of its last acts, a bill on the implementation of the Recast Directive 2006/54/EC.[80] The Bill now needs to be examined by the relevant parliamentary commissions and then be approved by the Government in order to become a law in the form of a legislative decree. However, the centre-left Government is no longer in power; therefore, we do not know, as yet, what the destiny of the Bill will be.

Nonetheless, the draft Decree provides important modifications to keys laws on the matter of gender equality in the labour market. Indeed, the Decree is intended to amend the 'Code of equal opportunities between men and women', the 'Code on maternity' and the 'Act on the reconciliation of work, private and family life'.[81]

The major amendments to the Equal Opportunities Code concern the notions of direct and indirect discrimination and the prohibition of discriminations, the National Committee on Gender Equality and Equal Opportunities at Work, the judicial remedies and mainstreaming.

Thus, the concept of discrimination is widened: sexual orientation is introduced as a ground of discrimination; an instruction to discriminate against persons on direct or indirect grounds of sex shall be deemed to be discrimination; and, finally, less favourable treatment related to pregnancy, motherhood or fatherhood, also to adoptive or

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[79] The document can be read at http://www.50e50.it/home.htm, accessed 27 April 2008.

[80] Directive 2006/54/EC, OJ L 204, 26.7.2006, pp. 23–36.

[81] Respectively, Legislative Decree No 198/2006, Legislative Decree No 151/2001 and Act No 53/2000.

respective rights, shall be deemed to be discrimination. At a first glance, the last-mentioned provision seems to be an important change. In fact, even after the issuing of Decree No 145 of 30 May 2005[82] and the 'Code of Equal Opportunities between men and women', discriminatory treatment on grounds of maternity is not expressly equated with discriminatory treatment on grounds of sex and, as a consequence, there is a gap in the enforcement of Directive 2002/73/EC.

The following minor changes have been made with regard to the precise definition of discrimination, even though this does not always seem to add a new hypothesis to those already existing in our system: selection criteria and recruitment conditions are expressly included in the prohibition of discrimination as regards access to employment and the prohibition is expressly extended to promotion; the prohibition of discrimination in relation to vocational training is extended to retraining, including practical work experience; the prohibition concerning equal pay is technically improved by an express reference to all aspects and conditions of remuneration; the prohibition with respect to working conditions is extended to dismissals and work suspensions, which were not taken into consideration in the previous legislation; and a new prohibition is also provided as regards occupational pension schemes.

The tasks entrusted to the National Committee established at the Ministry of Labour to promote equality and equal opportunities between men and women in the labour market and in the employment relationship are better specified, namely in relation to equal pay, professional training and occupational pension schemes. Moreover, its powers are increased so as to include conducting independent surveys, publishing independent reports and making recommendations on the implementation of gender equality. The Decree also provides for the Committee to promote equality by stimulating social dialogue between the social partners at both the labour market and workplace levels; the Committee is then required to exchange information with the EU bodies which operate in the field of equal treatment and to promote collaboration with non-governmental organizations involved in equality issues. The Decree also attempts to improve the level of collaboration among Ministries by including in the Committee a representative of the Ministry of Equal Opportunities and one from the Ministry of Family Policies.

Another field of intervention by the draft Decree is judicial remedies. All the judicial procedures provided by the Equal Opportunities Code are now made available for specific cases of discriminations related to access to employment, vocational training and promotion and working conditions, equal pay and occupational pensions: the detailed list, as opposed to the previous general formula, which referred to the prohibition of discrimination, can end up restricting rather than widening the area to enforce the principle of equal treatment. The sole judicial procedure which is going to benefit from the detailed list of grounds of discrimination is the special judicial urgency procedure: indeed, this procedure was expressly provided to enforce the prohibition of discrimination as regards access to employment and until now it was unclear whether or not it could also be used for the other areas of discrimination. Furthermore, the Decree provides that the right to engage in the urgency procedure – previously made available to the worker and to the local equality advisor and to the trade union on his/her behalf – is now granted to any organization which has a legitimate interest in the implementation of the prohibitions. All the sanctions for the non-observance of judicial decisions have been substantially increased. The Decree also intervenes to

[82] The document can be read at http://www.gazzettaufficiale.it/guri/attocompleto?dataGazzetta=2005-07-7&redazione=005G0169&service=0&ConNote=2, accessed 27 April 2008.

shift the burden of proof: the possibility to establish, before a court, facts from which discrimination may be presumed so as to shift the burden of proof to the respondent is indeed widened, as the requirement to be precise and concordant has been dispensed with. The judicial remedies provided are also applied by the draft Decree to the hypothesis of victimisation, that is to say to protect employees against any adverse treatment by the employer as a reaction to a complaint or to any legal proceeding aimed at enforcing the principle of equality. All the provisions described above run the same risk of only being enforceable in specific cases of discrimination expressely determined by the Decree, as their objective scope does not seem to include the general ban on discrimination.

Finally, the Decree introduces gender mainstreaming. A general obligation is established to take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas of access to employment, vocational training, promotion, working conditions, equal pay and occupational pensions.

The Bill also amends the Maternity Code. In first place, the draft Decree provides that parental leave can also be taken on an hourly basis. Then, provision is made to grant the mother (and eventually the father) who returns to her job after the period of compulsory maternity leave any improvement in working conditions to which she would have been entitled during her absence. Further, the prohibition on dismissing the mother (and eventually the father) before the child has reached one year old and on dismissal due to taking parental leave are extended to international adoptions.

The Bill also repeals Article 9 of the 'Act on reconciliation of work, private and family life', concerning working time flexibility. The new text provides for contributions to be paid to employers who carry out positive actions geared towards reaching a balanced participation of women and men in family and working life through the following: the introduction of working time flexibility and innovative systems of productivity evaluation; provisions aimed to make returning to work after parental leave easier; and projects aimed at promoting, together with social partners and local authorities, innovative interventions and services concerning reconciliation.

Case law national courts

Indirect discrimination in a hiring procedure

The *Corte di Cassazione*[83] heard a case concerning the hiring procedure for drivers at a transport company and it found that the minimum height requirement of 1.55 m (exactly the same for men and women) indirectly discriminated against female applicants. The grounds of the judgment refer to the Constitutional Court[84] which stipulated that such a prerequisite – which fails to take into consideration that the average height of the two sexes is different – must be considered contrary to the principle of equality, as it involves a systematic production of effects which are proportionately more disadvantageous to candidates of the female sex. Although indirect discrimination was established by the Court, the judge failed to seize the opportunity to fully investige the matter as he did not make any reference to the legislative notion of indirect discrimination.

[83] Case No 23562/2007.
[84] Case No163/1993, published in *Rivista Giuridica del Lavoro* 1993, II, 295.

LATVIA – *Kristīne Dupate*

Policy developments

Currently there are no considerable political changes regarding more active political and national legislative initiatives towards gender equality. The position is that politicians do not consider gender inequality to be an existing problem although statistical data, for example in the field of employment, proves the opposite.

Politicians place more emphasis on the increasing birth rate. At the same time the urgent problem of a lack of child-care services such as kindergartens has emerged, which has been slowly solved.

At the end of 2007 NGOs concerned with the protection of women's rights proposed that politicians should adopt a Law on gender equality providing for the principle of equality in all areas starting from budgeting and ending with non-discrimination in the private sector. However, this proposition was considered to be ungrounded. Such an attitude may be explained by the lack of any ability to recognize sex discrimination and also a lack of statistical data on and research into many areas of everyday life.

Legislative developments

Goods and services

Directive 2004/113/EC[85] had to be implemented by 21 December 2007; Latvia did not manage this, however. The history of the Directive's transposition already started in 2006. The Ministry of Welfare and the Secretariat of Society Integration Affairs prepared amendments to the Civil law in order to transpose Directive 2004/113/EC. The amendments provided that the principle of non-discrimination has to be observed in any public offer of goods or services to the public. However, this legislative proposal was rejected by Parliament upon second reading in January 2007.

The Ministry of Justice considers that the proposed amendments to the Civil law extend far beyond the scope of Directives 2004/113/EC and 2000/43/EC.[86] In particular, it considers that the material scope of the Directives requires that only those goods and services which are publicly offered by persons within their professional activities should be covered. Namely, that the material scope of the Directives does not cover those legal transactions where persons offer goods outside their professional activities, for example, a person sells his/her own apartment and offers it for sale to the general public through an announcement. Parliament accepted the Ministry of Justice's point of view.

Consequently, other legislative steps were taken in order to implement Directives 2004/113/EC and 2000/43/EC covering persons who offer and supply goods and services within their professional activities. Currently, amendments to the Law on the Protection of Consumers Rights[87] and to the Law on Insurance Companies and their Supervision are pending and await implementation.[88] On 17 April 2008 Parliament

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[85] Directive 2004/113/EC, OJ L 373, 21.12.2004, p. 37.

[86] Directive 2000/43/EC, OJ L 180, 19.07.2000, p. 22.

[87] Amendment No 660, available at www.saeima.lv; http://titania.saeima.lv/LIVS/SaeimaLIVS.nsf/0/A883E465DCE4F409C2257427004E50FA?OpenDocument, accessed 28 April 2008.

[88] On 20 December 2007 amendments to the Law on Insurance Companies and their Supervision were submitted to the Cabinet of Ministers by the Ministry of Welfare; on 17 April 2008 Parliament passed amendments to the Law on the Protection of Consumers Rights at first reading.

passed amendments to the Law on the Protection of Consumers Rights[89] at first reading and on 20 December 2007 amendments were submitted to the Cabinet of Ministers by the Ministry of Welfare. Amendments to the Law on the Protection of Consumers Rights provide for a prohibition of discrimination on grounds of sex, race or ethnic origin regarding access to and the supply of goods and services, definitions of direct and indirect discrimination, and harassment. Amendments to the Law on Insurance Companies and their Supervision envisages the prohibition of the use of gender-based actuarial factors and less favourable treatment related to pregnancy and maternity resulting in differences in an individual's premiums and benefits.

Labour law

The Ministry of Welfare has elaborated amendments to the Labour law.[90] Among various amendments, several concern EU gender equality law.

Amendments to Article 29(5) provide that less favourable treatment on grounds of pregnancy and maternity constitutes direct discrimination on the ground of sex. This amendment is crucial for the effective enforcement of EU non-discrimination law because national case law shows that courts do not consider a breach of special rights during pregnancy and maternity to be a breach of the principle of non-discrimination.

Amendments to Article 60(3) provide for the abolition of the one-month term for bringing a claim based on unequal pay. Thus, with regard to equal pay claims, the time-limit for bringing an action before the courts will be the general time-limit: two years as applies to all other claims arising out of an employment relationship (except dismissal), which corresponds to the principle of equality of remedies under EU law.

Social security

Since 1 January 2008 a new statutory social insurance allowance was introduced: the parental allowance.[91] This allowance is paid to one of the parents until the baby reaches the age of one year. The predecessor of the parental allowance was the non-contributory state social allowance: the child-care allowance. The parental allowance is a contributory allowance paid from the state social insurance budget, thus the amount of the allowance is not limited as it was previously with the child-care allowance. The amount of the parental allowance is dependant upon previous statutory social insurance contributions. One of the parents is entitled to 70% of his/her gross salary until the baby reaches the age of one year. However, the level of social protection given to parents after child-care leave remains problematic. During child-care leave the state insures the parent instead of the parent doing this himself/herself, but only to a minimum amount as if the parent would only earn LVL 50 (EUR 70) gross per month.[92] Consequently, if, for example, the risk of unemployment becomes a reality during the period immediately after child-care leave, the person in question is only entitled to the minimum unemployment allowance. Since a considerably greater proportion of women than men still make use of the right to child-care leave, this situation constitutes indirect discrimination against women.

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89 Amendment No. 660, available at www.saeima.lv; http://titania.saeima.lv/LIVS/SaeimaLIVS.nsf/0/A883E465DCE4F409C2257427004E50FA?OpenDocument, accessed 28 April 2008.

90 Available at www.mk.gov.lv, accessed 28 April 2008.

91 Amendments to the Law on State Social Insurance, OG No 190, 27.11.2007.

92 Regulation No 230 'Regulations on statutory social insurance contributions from the state budget and statutory social insurance budgets', OG No 91, 13.06.2001, as amended up to 2008, OG No 41, 13.03.2008.

Case law national courts

On 12 February 2008 the Constitutional Court of Latvia delivered a decision regarding the disabled child-care allowance.[93] The Court decided that Article 7^{1}(2) of the Law on State Social Allowances does not correspond with requirements of Article 110 of the Latvian Constitution.

Article 7^{1}(2) of the Law on State Social Allowances provided that persons who are on maternity leave or child-care leave are not entitled to a disabled child-care allowance, while Article 110 of the Constitution provides that the state protects and supports family, parents' and childrens' rights and that the state especially helps disabled children. The Constitutional Court established that any restriction to the right to a disabled child-care allowance has no legitimate aim or any general interest for society because all the mentioned allowances are provided in order to accommodate the different needs of persons on particular occasions. For example, the aim of the maternity allowance is to protect women during the pre and post-birth period by providing an allowance as a substitute for the loss of income from work, while the aim of the disabled child-care allowance is to support the family which cares for a disabled child, because this care entails additional expenses.

The Constitutional Court did not analyse this issue from the perspective of Article 91 of the Constitution which provides for the principle of non-discrimination. So, the Court did not touch upon the issue of the Community law on equal treatment between the sexes. Since Latvia provides for paid paternity leave, restrictions on obtaining any kind of allowance on the ground of maternity leave constitutes direct discrimination based on sex.

LIECHTENSTEIN – *Nicole Mathé*

Introduction

In Liechtenstein the first Gender Equality Act entered into force in 1999 and was recently revised in 2006. From a legal point of view there should be no obstacle to applying the gender equality principle correctly. However, there is no significant jurisprudence from the courts in Liechtenstein concerning gender equality.

Nevertheless, the Government's Equal Opportunities Board states that it is receiving more or less informal complaints about the lack of a correct application of gender equality law. In most situations the acting stakeholders even seem to be unaware of probable discrimination on the grounds of sex because most people still adhere to stereotype behaviour without profoundly reflecting on the situation.

In order to combat this situation Liechtenstein's Government, in cooperation with NGOs, decided to initiate awareness-raising campaigns. Therefore the main part of the observations and reporting reflect the policy developments in Liechtenstein concerning gender equality.

[93] Case No 2007-15-01, available at the home page of the Constitutional Court of Latvia: www.satv.tiesa.gov.lv; www.satv.tiesa.gov.lv/upload/2007_15_01_inval.htm, accessed 25 April 2008.

Policy developments

Equal Opportunities Prize

The prize of 20 000 Swiss Francs honours and helps to finance projects in the fields of gender equality, handicaps, migration and integration, social disadvantage, age and sexual orientation. Enterprises, organisations, private initiatives or individuals are eligible to receive this prize. The project has to be ready to start and has to be of lasting effect.

Recognition award 2008

'Equal Opportunities 2008' is the title of a recognition award to promote equal opportunities for all in Liechtenstein.[94] This award was granted for the eighth time by the Department of Family and Equal Opportunities and, this year, went to the project *Talente-Tauschbörse*, a project by the association for the handicapped in Liechtenstein. The award goes to organisations, private initiatives or persons, companies or administrative offices. On this occasion, the field of topics was expanded and a consideration of the gender mainstreaming strategy was requested. To date, the award has concentrated on equality between women and men. For the first time, this year age, handicaps, social disadvantages, sexual orientation as well as migration and integration have also been made eligible for the award. With this award, the Government actively promotes equal opportunities for all and contributes to raising public awareness. The call for tenders for the next recognition award will take place in September 2008.

Business day for women 2008

The Business day took place in Vaduz on 25 February 2008 and it brought together many women occupying key positions. The new economic forum will analyse the specific needs of female managers and entrepreneurs and how they think and act.

Training course in politics (Politiklehrgang) 2008

In March 2008 the training course in politics for women was organised for the fifth time. The course enables and encourages women to promote their ideas and potential in political committees and in public.

European Year of Equal Opportunities for all 2007

In total more than 12 specific topics were dealt with in various events for the public in Liechtenstein during the European Year of Equal opportunities. One topic dedicated to gender in medicine was still ongoing under the title 'Health female – male' with events in January and March 2008.

Handbook for reconciling work and the family

This handbook published in Switzerland and on the Internet in September 2007 includes a chapter concerning the situation in Liechtenstein. The Handbook[95] gives practical examples and supports small and medium-sized enterprises in implementing measures to achieve a family-friendly management of the enterprise. The central message is that enterprises which support their employees who have family duties have advantages for the enterprise itself.

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[94] Press release by the information office of Liechtenstein dated 08.03.2008.

[95] http://www.llv.li/pdf-llv-scg-handbuch_fl_web.pdf, accessed 14 June 2008.

Trafficking in women
In December 2007 sensitive work concerning trafficking in women appeared in an exhibition and a short film, followed by a discussion round between experts. Concerned persons expressed their views, measures against forced prostitution were proposed and the following message to all men was made abundantly clear: Anybody who buys sexual services from a victim of trafficking in women is participating in an inhuman crime.

Legislative developments

Trafficking in women and children
Liechtenstein has implemented the Additional Protocol to prevent, suppress and punish trafficking in persons, especially women and children, an additional protocol to the United Nations Convention against transnational organised crime.[96] The abovementioned protocol entered into force on 21 March 2008.[97]

Domestic violence against women
The Government answered an interpellation regarding domestic violence against women in its session on 18 March 2008 and transferred it to Parliament.[98] In the Government's report, the legal framework, as well as the general situation concerning domestic violence in Liechtenstein, was described. When creating the legal norms regarding protection against violence, effective instruments were applied to prevent and combat each form of domestic violence. Nevertheless, the Government is aware of the fact that, above all, information and awareness regarding the problem of violence is an essential instrument to deal with domestic violence in Liechtenstein. The answer to the interpellation concerning domestic violence as a very important socio-political topic will be an incentive to increase awareness among the public.

Miscellaneous

International symposium promoting gender equality
On 6 March 2008, the Minister for Foreign Affairs, Ms Rita Kieber-Beck, participated in a symposium in Brussels entitled 'Women: Stabilizing an Insecure World', organised by EU Commissioner Ms Benita Ferrero-Waldner.[99] The official participation of Liechtenstein in this international EU conference showed that the country is willing to cooperate on an international basis regarding gender issues.

Equal pay statistics
The first statistics on the salaries of employees in Liechtenstein have been published by the department of national economy.[100] The average gross wage of women was 20 % lower than that of men in the year 2005. Women earned on average CHF 5 092 (EUR 2 869) per month, whereas men earned CHF 6 381 (EUR 3 595) per month. The evaluation of wage differences also has to consider that they partly depend on objective grounds like age, education, the industrial sector, or the level of require-

96 Official Gazette 2008 No 74.
97 Official Gazette 2008 No 74.
98 Press release by the information office of Liechtenstein dated 21.03.2008.
99 Press release by the information office of Liechtenstein dated 06.03.2008.
100 Press release by the information office of Liechtenstein dated 10.03.2008.

ments for a particular job. Therefore, it cannot be directly concluded that the differences constitute discrimination.

LITHUANIA – *Tomas Davulis*

Policy developments

There have been no significant changes in the general gender equality policy but the tendency of strengthening financial support for families raising children is significant. The Labour Code grants the right to parental leave until a child has reached the age of three, but the parental allowance paid by the State Social Insurance Fund was limited to the period until the child reaches the age of one year and could not exceed 70 % of the parent's salary, subject to minimum and maximum limits. During 2007 the parental allowance reached 85 % of the parent's salary and in 2008 the financial support has been nearly doubled: for the period of parental leave until the child reaches one year – 100 % (maximum approx. EUR 2 000 per month), for the period of parental leave until the child reaches two years – 85 % of the salary. According to the Labour Code the right to parental leave is gender-neutral, i.e. it is granted to the mother (or adoptive mother), the father (or adoptive father), the grandmother, the grandfather or any other relative who actually raises the child, and also to the employee who has been recognised as the guardian of the child. Formally, both parents may apply for parental leave; however, it comes as no surprise that the overwhelming majority of applicants are women.[101] The decision was welcomed by all social groups and especially by young women demonstrating before Parliament with baby prams. According to the survey by the Centre for the Development of Equal Opportunities, young women from 16 to 24, mostly raising a child alone, without higher education and possibilities to integrate into the labour market, constitute the largest group among persons under poverty line. It may be questioned whether the attractiveness of parental leave will not provide another stimulus for women to stay away from the labour market for another consecutive year. Despite the overall satisfactory situation in Lithuania in terms of women's employability and employment, as well as education, there are significant differences in the representation of women across the economic sectors and professions. The legislative incentives to create a more efficient network of social services for childcare so as to attract men to take over family responsibilities are lacking.

Legislative developments

In late December 2007 the Lithuanian Parliament passed Law No X-1380,[102] aiming to flesh out the transposition laws in the area of gender equality and taking into account Recast Directive 2006/54/EC. The legislator formulated a new definition of direct discrimination (Article 2(4) of the Act). Direct discrimination is now defined as treating one person less favourably on grounds of gender than another person is treated, has been treated or would be treated in a comparable situation. In addition, the definition of work-related exceptions to the principle of equal treatment has been

[101] In 1997 the percentage of men on parental leave was 0.53 %, in 2000 – 0.9 %, in 2003 – 1.1 % and in 2006 – 2 %.

[102] Law of 18.12.2007 on the Amendment of Articles 2, 3, 4, 5, 6, 7, 9, 12, 24 and 27 of the Equal Opportunities for Women and Men Act (State Gazette, 29.12.2007, No 140-5755).

specified more explicitly (Article 2(4) p. 5 of the Act): the necessity to employ a person of a particular gender may be based on the nature of the activity or the context in which it is carried out, provided that the objective sought is legitimate and complies with the principle of proportionality. The Law has brought the definition of indirect discrimination (Article 2(5) of the Act) into line with the Directive providing that there may be different treatment where the provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving this aim are appropriate and necessary. This exception failed to meet the definition of indirect discrimination after the introduction of the Act. The obligations of the employer not to discriminate against employees have been complemented to include promotion (Article 5 p. 1 of the Act) and the payment of all supplements and all additional payments (Article 5 p. 3 of the Act). A new prohibition of discrimination based on sex has been included with regard to membership of and involvement in an organization of workers or employers, or any organization whose members carry out a particular profession, including the benefits provided by such organizations (Articles 5-2 and 7 of the Act). The somewhat strange character of this provision reflects the fact that the Lithuanian legal system is not familiar with the notion of 'organization of workers' since it uses the terms 'trade union' and 'works council'. This is an important novelty as it amounts to a significant improvement in the possibilities to defend the injured rights of victims of discrimination and is consolidated in Article 9(2) of the Act. It provides victims with a right of representation in administrative and court proceedings and this is applicable to organizations of workers and employers and to other legal persons having a legitimate interest, if they obtain the written consent of the victim (Article 9(2) of the Act). Analogous rights may be found in the Law on Trade Unions[103] in connection with the Code of Civil Procedure of 28 February 2002,[104] so trade unions were already allowed to represent their members. The inclusion of other legal persons having a legitimate interest in the circle of persons with competence to initiate legal proceedings and to participate therein may have great potential. However, the practical realization of these rights cannot only depend on the capacities and skills of these organizations, but also on the interpretation of the said provision by the courts. Since Article 56 of the Code of Civil Procedure, which defines the institutions which are eligible to represent other persons in civil proceedings, has not been accordingly amended, the courts may refuse such representation on the ground of the supremacy of the Code of Civil Procedure (Article 1(1) Code of Civil Procedure). Furthermore, the new law has extended the competence of the Ombudsman of Equal Opportunities giving him/her the right to provide victims of discrimination with objective and impartial advice.

The amendments clearly indicate the intention of the legislator to improve the existing legal basis with the adoption of the Recast Directive. By selecting and transposing some provisions of the Directive, the legislator aims to fill the most evident gaps in national legislation. The main remaining problem concerns the scope of application of the Act: neither public services nor self-employed persons are explicitly addressed in the Act, and only the newly introduced Article 7-2 of the Act refers to 'public and private sectors' where discrimination with regard to membership of an organization of workers or employers is prohibited. It seems that the Act has lost its internal structure and has now become too complicated in terms of its structure and language. Some people advocate a merger of the Equal Opportunities for Women and Men Act with

[103] State Gazette, 1991, No 34-933.
[104] State Gazette, 2002, No 36–1340.

the Equal Opportunities Act, which deals with non-discrimination directives from 2000, but the official debate on this has not yet started.

Equality decisions/opinions

The Office of the Ombudsman of Equal Opportunities delivered its annual report to Parliament in which certain statistics relating to investigated complaints were presented. It was announced that in 2007 162 complaints were investigated by the Office and 47 complaints were related to discrimination based on sex. Compared to 2006, the number of gender-related complaints had increased by more than 80 %. Some 60 % of the 47 complaints were initiated by women, 33 % by men and 7 % by organizations. The majority of complaints (43 %) were related to discrimination in the services sector, including discriminatory advertising, and only 29 % in employment and occupation. The complaints arising from employment and occupation still remain one of the most intensive areas of the Ombudsman's activities. The relatively small number of complaints concerning sexual harassment and harassment in general (nine) indicates the persistence of social, legal and psychological obstacles to defending the right to non-discrimination.

Considering the results of the activities of the Office of the Ombudsman of Equal Opportunities to be positive, Parliament appointed Ms Ausrine Burneikiene for a third consecutive term of four years.

Miscellaneous

A few reports were presented with some relevance to gender equality in the sphere of occupation. The National Union of Student Representations of Lithuania (LSAS) presented the results of a sociological survey on opportunities for men and women to participate in scientific and pedagogical activities, the management of institutions of higher education and career opportunities. Scholars and graduates were interviewed about their personal aims and achievements in both scientific and pedagogical activities, as well as the gender-related characteristics of the 'good' scholar. The points of view of men and women on academic career opportunities were quite different. Men consider that opportunities are equal, but women disagree. They are more concerned about their professional development, while men concentrate on their career. As mentioned by the women, the most important factors determining the domination of men in science were stereotypes and social reasons. The majority consider analytical thinking and an openness to innovation to be the characteristics of a good scholar and they attributed them to men. Some 34 % of participants (mostly men) agree that priority was usually given to men, and only 7 % consider that women have better opportunities. Another survey by the Lithuanian Business Employers' Confederation (LVDK) on the general situation of small and medium-sized businesses in Lithuania has revealed *inter alia* that two-thirds of all directors (heads, chief executives, general managers) of small and medium-sized enterprises in Lithuania are men.

LUXEMBOURG – *Anik Raskin*

Introduction

In Luxembourg gender equality can be considered as a relatively new area of interest as it was only introduced as an independent policy area in the mid 1990s. By now gender equality is still perceived as a women's issue.

By creating the *Ministère de la Promotion Féminine* (Ministry for the advancement of women) in 1995, Luxembourg declared its will to promote equality between women and men. In 2004, the name of the Ministry changed into *Ministère de l'Egalité des chances* (Ministry for equal opportunities). The focus of this Ministry remains gender equality even though its name no longer specifies this.

In general, gender equality seems to have lost some of its importance on the national level. Two worrying movements can be identified. First, the idea according to which equality between women and men has already been attained seems to be increasingly spreading. On the other hand, a certain political will to deal with sex-based discrimination just like minority discrimination has appeared.

Policy developments

In December 2007 Parliament, reacting to an interpellation by a deputy, had to discuss the public policy which had to be adopted regarding prostitution. In January 2008 an international colloquium was organized on this matter by the University of Luxembourg and the National Council of Women of Luxembourg. In April 2008, the Government launched a campaign with the aim being to shift responsibilities on to the clients of prostitution and it also organized a conference focusing on the role of the client in prostitution and human trafficking. A legislative proposal[105] introduced by four deputies proposes to penalise the clients of prostitution. According to this proposal, clients should be sentenced to sensitive penalties such as carrying out community service or attending appropriate seminars. The matter is still under discussion.

In March 2008, Parliament invited representatives of civil society to a public hearing for an exchange of opinions on the Lisbon Strategy. Gender issues were only briefly discussed and this at the request of the *Comité du Travail Féminin*, a Government advisory committee. None of the NGOs which operate in the field of gender equality were invited to this public hearing. A second public hearing took place in April 2008. Responding to the request of the National Council of Women, Parliament did invite this NGO to the second hearing.

Legislative developments

Implementation of gender equality directives

Directive 2002/73/EC has still not been implemented. Bill No 5687 transposing Directive 2002/73/EC was introduced in Parliament on 1 March 2007. The initial project has been amended by the Government. It was meant to be submitted to a vote in Parliament on 30 April 2008.

On 18 December 2007, Parliament adopted bill No 5739 which implements Directive 2004/113/EC. As was announced by the Government, the implementation reflects a so-called 'one-to-one' approach. Education and advertising have been omit-

[105] http://www.lsap.lu/files/doc_center/20080312_Proposition_de_loi_sur_la_prostitution_ErrL.pdf, accessed 25 April 2008.

ted. In insurance matters, every proportionate difference in individual premiums and benefits, as allowed by the directive, has now been implemented.

The amended version of bill No 5687 maintains different standards regarding the conditions for legal existence to be fulfilled by associations for the recognition of their legitimate interest in engaging in procedures such as those determined by the implementing law of Directive 2004/113/EC.

On 11 April 2008, Bill No 5867 concerning parental responsibility was introduced by the Government in Parliament. It is meant to retain parental responsibility even after divorce.

Equality body

Four out of the five members composing the national equality body, the *Centre pour l'Egalité de traitement,* have been designated by Parliament. The aims of the body are specified under the Law of 28 November 2006. It is concerned with discrimination based on race and ethnic origin, disability, age, religion or belief, sexual orientation and sex. No specific body has been established regarding equality between men and women and gender equality.

MALTA – *Peter G. Xuereb*

Policy developments

There have been no substantive policy developments since January 2008. This is due in particular to the fact that national parliamentary elections were held in Malta during this period. During the course of the electoral campaign the two main political parties reaffirmed their commitment to furthering the place of women in society, in employment, in decision-making in all spheres and at all levels, and in public life.

Nor have major initiatives or proposals been taken or made since the elections in March. The focus has been on other issues related primarily to the economic sphere (competition matters in prime place). Yet the need is pressing to tighten up on the enforcement of gender equality legislation, starting with the clarification of key provisions of law, and the overlap between various pieces of legislation. In particular, no secondary legislation has as yet been enacted under the powers given to the Minister by the Equality for Men and Women Act. This means that key procedural provisions governing access to justice and the conduct of proceedings remain lacking. Also the status of the National Commission for the Promotion of Equality as a litigant needs to be developed and clarified. It is all too clear that there is great reluctance on the part of victims in a small community to report breaches of the law, but even less to litigate in support of their rights. In the writer's opinion, this is the key challenge that faces the policy-maker now. The Government has also promised a full review of Maltese law across the board from a gender perspective. This again has not yet occurred and is called for as a priority task over the next two years at most.

Legislative developments

Parliament has been in recess for much of the period under review. Principally for this reason there are no legislative developments to report for the period under review.

Case law national courts

There has been one national court judgment of related interest in this period. This was a judgment[106] delivered by the Court of Magistrates in its criminal jurisdiction against a certain Mr Norman Lowell, who heads the *Imperium Europa* party, a small political party to the right of the political spectrum which has declared that it will be fielding at least one candidate in the forthcoming European Parliament elections in 2009. Mr Lowell was found guilty of having committed the offence of incitement to racial hatred. What is of interest is that the Court took what it described as a hard line with a view to deterrence in sentencing Mr Lowell to two years' imprisonment (suspended for two years) and a fine of circa EUR 1 200. The judgment could have an important application in the context of multiple discrimination. There are in Malta large numbers of female asylum seekers or refugees from various African and other countries who are either in closed or open detention centres (the latter if pregnant or accompanied by children) or even out in the community, and who can have the right to seek employment. This judgment is an indication as to how the Maltese courts will approach any issue of racial discrimination and should be borne in mind should any case emerge on discrimination involving women of different race or ethnic origin.

Equality body decisions/opinions

Details of complaints are not published. Nor does the equality body, the National Commission for the Promotion of Equality (NCPE), render decisions. It is empowered by the Equality for Men and Women Act[107] to receive complaints and to investigate these as well as to mediate between the complainant and the alleged infringer, but otherwise it can only bring legal proceedings with the consent of the complainant. Some general insight can be gleaned from the Annual Report of the National Commission for Equality, which is referred to in the next section. In 2007, the NCPE brought its first case before the Industrial Tribunal on behalf of a woman who claimed to have been dismissed for reasons related to pregnancy, but an out-of- court settlement led to the case being dismissed with no judgment given.

Miscellaneous

Equality body's Annual Report for 2007 published

The National Commission for the Promotion of Equality published its third Annual Report on 28 February 2008 and it covers the previous year, 2007. It is the first report produced by the NCPE since its functions were extended beyond 'gender and family responsibilities'[108] to include 'race and ethnic origin'.[109] The report highlights advances made in terms of reconciliation of work and family life and increasing female employment and self-employment, while acknowledging the need for greater progress. The report summarises the work of the NCPE in 2007, including research pro-

[106] Not yet reported.

[107] Chapter 456 of the Laws of Malta, see: www.justice.gov.mt/justice/legalservices.html, accessed 28 April 2008.

[108] Under the Equality for Men and Women Act (Chapter 456 of the Laws of Malta).

[109] By virtue of Legal Notice 85 (Equal Treatment of Persons Order) of April 2007, transposing the 'non-employment' provisions of Directive 2000/43/EC. Accessible at www.doi.gov.mt, accessed 15 June 2008. The NCPE Annual Report 2007 can be accessed on the NCPE website at www.equality.gov.mt, accessed 15 June 2008. It can be noted that the 'employment' provisions of Directive 2000/43/EC were transposed by Legal Notice 338 of 2007.

jects, awareness-raising campaigns, participation in conferences at home and abroad, organisation of training events (such as on combating sexual harassment), information requests and information dissemination, and complaints received and investigated. Details of complaints are not given, but it is reported that the NCPE dealt with a number of complaints of sexual harassment (one of the most frequent grounds of complaint) as well as complaints relating to (the failure to abide by) family-friendly measures, among others. The other complaints included some regarding teleworking, and these prompted the NCPE to enter into discussions with the Government about teleworking in the public service and the wider public sector, and to push for progress on this front also in the private sector.

National Council of Women (NCW) Annual General Meeting January 2008

In its Annual General Meeting the NCW reaffirmed certain outstanding issues as priority matters on its agenda, principally as subjects for lobbying with the Government. These include: full implementation of equal pay for equal work and work of equal value; childcare facilities; equal representation in decision-making; young persons issues; legislation on temping agencies; the national breast-screening programme; the early detection of domestic violence.[110]

New report on family poverty and social exclusion

February 2008 is the official date of the publication of a report on *Family Poverty and Social Exclusion – with a Special Emphasis on Children*.[111] The report was commissioned by the *Kummissjoni Nazzjonali Familja*[112] and was compiled by Angela Abela and Carmel Tabone. The report calls, among other things, for an increase in the minimum wage as well as in unemployment benefits and in the children's allowance, while advocating measures to address the benefit trap, and also for the setting up of family-focused trans-disciplinary teams. It casts additional light on the state of female poverty in Malta.

Female participation in work goes up in late 2007

Figures released on 3 April 2008 by the National Statistics Office (NSO)[113] indicate that there has been a statistically significant shift in the employment of women. The Labour Force Survey, covering the last quarter of 2007, indicates that a statistically significant change in average employment was reflected in the female participation in employment. The activity rate for women now stands at 40.5 % (the official target is that the female employment rate be raised to 41 % by 2010[114]). With the equivalent rate for men standing at 77.9 %, that leaves an activity gender gap of 37.4 %. The majority of women are stated to be working as service workers or shop assistants. Of all full-time employed persons, 28.2 % are female according to these latest figures. Of all persons working part-time, 72.7 % are female. The rate of female unemployment is 7 % (5.8 % for males). In sum, this means that the number of women in employment has increased by 3 500 over the same period in the previous year. It remains the case

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[110] For the full set of approved resolutions, see http://www.ncwmalta.com, accessed 15 June 2008.

[111] A. Abela & C. Tabone *Family Poverty and Social Exclusion with a Special Emphasis on Children*, Kummissjoni Nazzjonali Familja 2008, ISBN 978-99932-0-590-6.

[112] The National Family Commission.

[113] Website: www.nso.gov.mt. Labour Force Survey October – December 2007, date of release 3 April 2008.

[114] *National Reform Programme – Malta's Strategy for Growth and Jobs 2005-2008, Addressing the Lisbon Strategy* (2005): http://www.mcmp.gov.mt/pdfs/National_Reform_Programme_Malta.pdf, accessed 15 June 2008.

that women outnumber men in employment in the fields of education, health and social work and service activities.

Abortion and Malta's representatives in the Council of Europe

The two political parties represented in the Maltese Parliament have combined together, even before Parliament has convened in Malta following the elections in March, to oppose a resolution brought before the Parliamentary Assembly of the Council of Europe. Resolution 1607, adopted on 16 April 2008, called for access to safe and legal abortion in Europe, effectively calling on all 47 Member States of the Council of Europe to legalise abortion. The Maltese representatives sought to ward off this (non-binding) resolution on pro-life grounds. The stance is worthy of note as typifying the position and arguments made and to be expected from Maltese representatives in international fora whenever the issue of abortion comes up for discussion or debate.[115]

Campaign against domestic violence launched on 8 January 2008

The entire month of January saw a public campaign (centred around bus-shelter posters all over the islands) with the message: 'No to Domestic Violence'. The campaign in Malta, part of the Council of Europe campaign, was launched by the National Commission on Domestic Violence in collaboration with the Association of Local Councils and some private sponsorship. The Commission has promised to carry out a prevalence study in 2008.

Smart Women Programme launched in February 2008

In February, Information Technology Minister Austin Gatt launched the Smart Women Programme, a programme that leads to Microsoft certification. The programme provides free training in computer skills and digital literacy for women, with childcare facilities provided free of charge. The large turnout for the launch was considered encouraging.

NETHERLANDS – *Rikki Holtmaat*

Introduction

In the last couple of years the Dutch Government has given little attention to gender equality issues. The Government seems to be of the opinion that the emancipation of women no longer needs special policy measures. Many 'specialized bodies' and governmental agencies (like e.g. the Emancipation Council) have been abolished. Also, in many cases, financial support for NGOs dealing with women's issues has been withdrawn. Only for immigrant women are there some targeted programmes (for instance, with respect to combating genital mutilation practices in some Muslim communities). However, in the media and within the trade unions, fierce debates are taking place on the 'stagnating' (equal) social and economic participation of women, especially in higher managerial and political positions. Proposals for a system of quotas (e.g. for CEOs in big enterprises, like the system that has been adopted in Norway) have been made, among others by the Dutch EU Commissioner Ms Neelie Kroes. The Government has until now strongly opposed any such proposals.

[115] http://assembly.coe.int/documents/adoptedtext/ta08/ERES1607.htm, accessed 28 April 2008.

Legislative developments

The introduction of a prohibition on face-covering clothing

Since 2005, there has been quite a lively debate in the Netherlands on the question whether the Dutch Government should prohibit the wearing of Islamic *burqas* or *niqaabs* in all public places or in specific areas or buildings (like in hospitals, schools, on trains or in public administration buildings). In that year, a majority in Parliament accepted a motion urging the Government to ban the *burqa* from public life. A committee of legal experts issued a report in 2006 concluding that a general ban on *burqas* or *niqaabs* would in effect amount to indirect discrimination on the ground of religion. Two members of Parliament, Mr Wilders from the Party for Freedom and Mr Kamp from the Liberal Party, were not satisfied that the Government did not take action and proposed a bill prohibiting *burqas* in 2006 and 2008 respectively. On 8 February 2008 the Government announced that it will soon propose a prohibition on face-covering clothing in education and in public administration institutions. This proposal includes a ban on face-covering clothing in general, including the *burqa* and *niqaab*. The Government has justified this proposal by stating that in education open communication and identification are important factors which require that teachers and students can see each other's faces. Furthermore, schools are responsible for the promotion of active citizenship and social integration and accepting face-covering clothing would constitute a barrier to a correct performance of this task. These reasons constitute a justification for a possible indirect distinction on the basis of religion. Also, there is discussion as to the fact that such a prohibition could constitute indirect sex discrimination, since it mostly affects women who – according to their religion – have to wear special (face or hair-covering) clothing. Some schools have already introduced such a prohibition. In 2004 the Equal Treatment Commission ruled that a prohibition on wearing face-covering clothing in schools is acceptable when the clothing hampers communication and identification, and affects safety. With regard to public administration institutions, face-covering clothing will be prohibited on the basis of the specific demands that public services entail in the area of openness and approachability. The Government is of the opinion that carrying out the duties of public service does not go together with wearing face-covering clothing. The wearing of face-covering clothing disguises facial expressions and creates a distance which is undesirable in public life and could entail risks to the functioning of the public institutions as a whole.[116]

The introduction of a pregnancy & maternity benefit for self-employed women

A scheme of publicly-funded maternity and pregnancy leave allowances for self-employed women has been lacking in the Netherlands since 2004, when a social security law covering this particular social risk was abolished. At that time, the Government was of the opinion that the need for a compulsory public insurance scheme was lacking and that there were sufficient alternatives on the private insurance market. However, in the years that followed it became clear that the private insurance market offers insurances for loss of income due to pregnancy only supplementary to a private disability insurance. Only 45 % of self-employed women have concluded such a private insurance contract. Moreover, a 2-year waiting period is often determined by the

[116] See *Kamerstukken II* 2006-2007, 31 108, Nos 1-4 (proposal by Wilders and Fritsma); *Kamerstukken II* 2007-2008, 31 331, Nos 1-3 (proposal by Kamp); *Kamerstukken II* 2007-2008, 31 200, No 4 (response of the Government); Equal Treatment Commission, Opinion 2004-138; *Kamerstukken II* 2005-2006, 29 754, No 41 (report by the expert committee).

insurance company, which means that in the first 2 years after having concluded the insurance contract there will be no payments for pregnancy and maternity leave. Between 2005 and 2007 there were several court cases against private insurance companies in which self-employed women unsuccessfully contested this arrangement as being unlawful under sex equality laws. Women who have not made financial arrangements are at risk of continuing to work until shortly before the delivery and returning to working too soon after childbirth. This could endanger their own health, as well as that of their baby. Under pressure from Parliament and some women's NGOs, the Government has now decided to remedy the situation by means of a new social security scheme. It is expected that around 5 000 women will rely on this social security scheme every year. The maximum allowance will be 100 % of the statutory minimum wage. This level is granted to women who have worked at least 1 225 hours during the past year. For women who have worked less that 1 225 hours during the past year, the level of the benefit will be dependent *pro rata* on the loss of profit/income in their past working year.[117]

Equality body decisions

Opinion of the ETC 2008-22 – 22 February 2008

Refusal to enter into a temporary employment contract with a pregnant woman
On 8 March 2008, the Equal Treatment Commission (ETC) stated in a Press Bulletin that discrimination against women in employment situations is still a serious problem in the Netherlands and that combating sex discrimination is a priority in the Commission's working programme. This is also reflected in the cases that are brought before the Commission. Of the 24 cases that the Commission had dealt with up until 8 March of this year, eight cases concerned discrimination against women. In seven of these cases the Commission was of the opinion that women had indeed been discriminated against. Many of the sex discrimination cases that are brought before the ETC are related to pregnancy. Pregnant women are often refused contracts or their (temporary) contract is not renewed when it becomes known that they are pregnant. ETC Case 2008-22 is illustrative of this. The case was initiated by a woman who was initially offered a temporary employment contract for one year by a community housing corporation. After she had announced that she was pregnant, she was told she was no longer regarded as a candidate for the function. The employer defended this decision by pointing to the limited availability of the woman. The Commission held that an absence caused by pregnancy and child birth is directly and inextricably connected with the pregnancy itself and therefore is protected on the same level as the pregnancy itself. It concluded that the corporation had made a direct distinction on the ground of sex.[118]

[117] *Kamerstukken II* 2007-2008, 31 366, No 1. Also see the website of the Ministry of Social Affairs and Employment: http://home.szw.nl/index.cfm?fuseaction=app.document&link_id=137877, accessed 24 April 2008.
[118] To be found at the website of the Equal Treatment Commission: http://www.cgb.nl, accessed 24 April 2008.

Opinion of the ETC 2008-39 – 15 April 2008
A publisher of a feminist magazine made a direct distinction on the basis of gender by only allowing women to apply for a function at the editorial office

The publisher of the feminist monthly magazine *Opzij* only allowed women to apply for a function at the editorial office. The publisher argued that the magazine is an institution on a political and/or ideological basis. Since only women can be feminists, being a woman is a necessary occupational requirement for achieving the feminist goals of the magazine. However, according to the ETC, Article 5(2) of the Dutch Equal Treatment Act could not be relied upon. The ETC was not convinced that only women can be feminists. Relying on the clause in the law allowing for preferential treatment did not succeed either, since the absolute exclusion of men from the function of editor does not meet the proportionality requirement. Finally, the publisher argued that the magazine with the whole of its editorial office consisting of women served as an exemplary function. The Commission found that this argument cannot be based on any of the legal exceptions to the prohibition of a distinction on grounds of gender. Therefore the Commission concluded that the publisher had made a direct distinction on the basis of gender.[119]

NORWAY – *Helga Aune*

Policy developments

Gender equality issues remain the focus of political attention and yet at the same time they remain controversial and difficult to push through the glass ceiling. Two examples can be given. One White Paper nailed the public employer and low pay as one of the main reasons for the pay gap and recommended that the state intervenes and financially supports a pay rise along with other measurements. However, this White Paper seems to have been locked away in a drawer. Another hot issue of the debate that has been going on for years is whether or not the CEDAW Convention should be implemented in the General Act on Human Rights of 21 May 1999 (*Menneskerettsloven*) or whether the CEDAW should remain implemented in the Gender Equality Act of 9 June 1978 (*Likestillingsloven*). The toughest opponent to implementing the CEDAW in the Human Rights Act is the Ministry of Justice which claims that the CEDAW is a 'special' convention applying only to a special group of people, as opposed to other conventions which apply to everyone. The CEDAW is in my view a victim of discrimination by the Ministry of Justice. Besides, if the goals of the CEDAW were met, the other half of humanity would clearly also be affected.

Gender and Pay. Facts, analysis and measures
The Ministry of Children and Equality has put forward a White Paper on '*Gender and Pay. Facts, analysis and measures'*.[120] The White Paper sums up the findings of the Equal Pay Committee in five points explaining the reasons for the pay gap of 15 % between men and women. The Committee found that differences in education and age

[119] To be found at the website of the Equal Treatment Commission: http://www.cgb.nl, accessed 24 April 2008.
[120] White Paper NOU 2008:6 on *Gender and Pay. Facts, analysis and measures.* See http://www.regjeringen.no/nb/dep/bld/dok/NOUer/2008/nou-2008-6.html?id=501088, accessed 15 June 2008.

explains very little of the present pay gap, as men and women in general do have equal pay for equal work in the same positions in the same enterprises. However, the pay gap exists in the gender-segregated employment market. The free negotiations system of employment market parties maintains stable, unequal pay relations between men and women, and the pay gap increases during the time of parenthood. Based on this analysis, the Equal Pay Committee presented six points of measures to fight the pay gap. These points include, firstly, strengthening the Gender Equality Act and the Gender Equality and Discrimination Ombud Act to increase more open information on pay, including pay statistics divided by gender. Secondly, increasing the pay level in the public sector, as well as thirdly, focusing on groups of employees/women with especially low pay in the private sector are seen as vital. A more even sharing of the parental leave between men and women, dividing the parental leave into three parts, one part reserved for each of the parents and one part which may be shared between the parents as they see best is seen as another efficient measure. To strengthen rights to an average pay increase after a return from parental leave is also recommended. Finally, the Commission pointed to the need to increase the recruitment of women to leadership positions.

The report of the Men's Panel

In connection with the current process of drafting the White Paper (to Parliament) concerning men and gender equality and male roles, a 'Men's Panel' of 30 men was appointed in 2007 to discuss men's role in modernity and challenges for gender equality as to masculinity. They handed over the conclusions of their work to the Minister for Children and Equality on 3 March 2008. Included in the report were 50 suggestions for activities meant to promote gender equality, which spanned activities such as dividing the paternal leave into four equal parts, regular check-ups of men's health, compulsory military exercises for women (equal to men) and a nationwide campaign to change male role models and ideas.

Action plan to promote female entrepreneurs

On 11 February 2008, an action plan to promote female entrepreneurs was launched by the Government. The aim of the action plan is to increase the number of female entrepreneurs, to reach 40 % of all new entrepreneurs over the next 5-year period. The Action Plan was developed by and will be implemented by seven different Ministries. Through this action plan the Government wants to promote and support female entrepreneurs. The plan was launched jointly by the Minister for Trade and Industry, the Minister for Local Government and Regional Development and the Minister for Children and Equality. A total of 12 different activities are covered by the Action Plan. Several of these activities directly address government institutions working to promote trade and commerce, such as Innovation Norway, the Research Council of Norway and the Industrial Development Corporation of Norway, in order to actively promote women as a specific target group, and work actively to increase the percentage women in all programme activities and services. One of the planned activities will be to increase the coverage during maternity leave for the self-employed.[121] This will be implemented in July 2008.

[121] For a more precise description, see below under 'Parental benefits to self-employed'.

Legislative developments

A number of interesting proposals have been put forward for consideration. These include:

The role of women and gays and lesbians in religious institutions
In January the Ministry of Children and Equality put forward a White Paper on *the role of women and gays and lesbians in religious institutions*.[122] The White Paper discusses the explicit exceptions in the Working Environment Act and the Gender Equality Act regarding protection against discrimination, in which the internal affairs of religious communities are exempted.

Parental benefits to self-employed
The Government has proposed[123] changes to the Social Security Act and as of 1 July 2008 this will imply that self-employed fathers and mothers shall be entitled to full salary compensation during maternity/paternity leave for an amount of up to 6G (approximately EUR 50 000 annually). As of today, the self-employed have a right to only 65 % salary compensation during maternity/paternity leave if they do not have private insurance that provides them with a 100 % salary compensation

Case law national courts

Judgment on compensation for lost work opportunity because of pregnancy
A recent judgment from *Alta tingrett* (court of first instance)[124] is one of the few judgments in Norway in which the claimant was awarded a rather large compensation for a breach of contract because of pregnancy. The claimant had applied for the position of head of a travel agency. Negotiations concerning the position had taken place, but a formal written working contract had not been drawn up. When the claimant stated that she was pregnant, she was told that she would not be employed. The claimant claimed that in reality she had been dismissed because of her pregnancy. In any case, she had a right to compensation for financial loss and non-economic damages because of the way she had been treated in the process as a consequence of her pregnancy. The court found it probable that the Gender Equality Act had been violated, as the employer had focused on the pregnancy in relation to the appointment process, and it awarded the claimant due redress in accordance with the Gender Equality Act.

Female worker in the fire service not given a full-time position[125]
A county had discriminated against a female worker in the fire service because of her age and gender when recruiting new staff in contravention of the Gender Equality Act and the Working Environment Act. The case concerned a female worker aged 41 who was employed on a part-time basis in the fire service. She subsequently applied for a longer, full-time vacancy, and then a full-time fixed position. A male worker aged 27 was admitted to the positions that the woman had applied for. The advertisements announcing the position had the following formulation: '*applicants should be between*

[122] White Paper NOU 2008:1 on *the role of women and gays and lesbians in religious institutions*, See http://www.regjeringen.no/nb/dep/bld/dok/NOUer/2008/NOU-2008-1.html?id=496347, accessed 15 June 2008.
[123] Proposition No 51 (2007-2008) to the *Odelsting* (the legislative Chamber of Parliament).
[124] Case No TALTA 2007-74733, judgment of 7 April 2008.
[125] Gender Equality and Anti-Discrimination Tribunal, case No 8/2008. Decision.

27 and 35 years of age'. The Tribunal thus found that the woman had been subject to differential treatment because of age. She had also been subject to differential treatment because of her gender, as her qualifications were not assessed.

Equal pay for work of equal value

The 'Harstad' case: equal pay for work of equal value[126]
A trade union complained on behalf of two of its members to the Gender Equality Ombud, alleging that their members did not receive equal pay for work of equal value. The two females were head nurses in a county-run nursing home, and compared their wages with those of four male lead engineers employed in the same county. The Ombud assessed, firstly, that the women carried out work of the same value as the male engineers. As nursing is a profession dominated by females, whereas males dominate among the lead engineers, the pay difference thus constitutes an indirect discrimination against women. Norwegian jurisprudence has formerly accepted that a higher market value has been seen as an objective ground for a pay difference. The Ombud considered that this was not a valid argument in this case, as the women as nurses were unable to prove their market value, as public institutions are their main employers, and they also have a limited right to strike in order to improve their market value. The Ombud thus found that the pay difference constituted a breach of the Gender Equality Act. The decision has been appealed to the Gender Equality and Anti-Discrimination Tribunal.

'Dirt compensation' to groups dominated by male workers and not to groups dominated by female workers
This case concerned cleaners in a county who were not entitled to receive '*dirt compensation*' according to the trade union agreement. The cleaners were mainly female workers. All other workers belonging to male-dominated groups were entitled to such compensation. The trade union representing the cleaners alleged that this omission in relation to the cleaners amounted to indirect discrimination because of gender. The county denied that the compensation was discriminatory and claimed that the scheme was partly a result of history, and that it was partly objectively justified by the fact that the work of the cleaners would only sometimes qualify for the dirt compensation. The Gender Equality Ombud found that the 'dirt compensation' scheme might imply indirect discrimination of men and women in violation of the Gender Equality Act, as the county had a stricter practice in relation to what would give a right to dirt compensation for cleaners than for other groups of employees. The Ombud pointed out that it is the responsibility of the employers to correct wage elements that have a negative effect on one of the genders.

POLAND – *Eleonora Zielińska*

Policy developments

Promotion of equal opportunities for women and men in employment and other spheres of public life has not been not taken seriously by any of the governments since our EU accession. This was also true for the previous Government, who pro-

[126] The Gender Equality and Anti-Discrimination Ombud, case No 2006/1834. Opinion.

moted, pro-family policy in traditional, catholic understanding and did not actively combate gender discrimination. It also seems true in the case of the present Government, who – until now – rather preferred to limit itself to some symbolic pro-equality moves, and manifested a far going reluctance towards undertaking effective pro-gender equality activities. The need for action is justified however by Poland's present situation, with low level of employment of women (48 % in 2007), significant discrepancies in remunerations of women and men, gender inequalities on managerial positions and high level of female unemployment (10.3 % in 2007).

This tendency to exclusively symbolic actions illustrates very well the story of the Office of Governmental Plenipotentiary for the Equal Status of Women and Men, which since 2003 also fulfilled tasks pertaining to combating discrimination for any other reason than gender. This Office was abolished in 2005 and replaced by the Department of Women, Family and 'Counteracting' Discrimination, within the Ministry of Labour and Social Policy. After the change of government in 2007 on eve of Women's day of 8th of March 2008, responding to the demands of many women's NGO's, the Prime Minister promised the revitalisation of the Plenipotentiary Office.[127] Following this declaration on 22nd of April 2008 the Ordinance of the Council of Ministers on the Creation of the Government Plenipotentiary for Equal Treatment has been enacted.[128] This Ordinance marked the revival of the idea of placing this institution at the same executive level as the Secretary of State at the Chancellery of the Prime Minister and put on it the obligation to fulfil tasks pertaining to combating discrimination also for any other reason than gender. The way in which the Plenipotentiary's competences were designed proves however to be contrary to any common expectations. Given its current position and mandate it is highly unlikely to be able to effectively play the role of an equality body in the sense of EC directives. In addition to that until the 30th of June 2008 the Office of Plenipotentiary did not commence any practical activity worth mentioning. This resulted, among others, in further delay of the implementation of the EU Goods and Services Directive 2004/113 and in total neglecting of the gender mainstreaming in policy making.

Legislative developments

On 25 April 2008 the Lower Chamber of Parliament (the *Sejm*) unanimously consented to the President ratifying the Convention of the Council of Europe on Action against Trafficking in Human Beings.[129]

On 19 April 2008 the Upper Chamber of Parliament (the Senate) agreed to renounce ILO Convention No 45 of 21 June 1935 concerning the Employment of Women on Underground Work in Mines, which was ratified by Poland on 23 May 1957.[130] On 28 March 2008 consent was also expressed by the *Sejm*.[131] The Ministry of Labour and Social Policy, in order to justify this renunciation, has pointed to the decision of the ECJ in Case C-203/03 *Commission* v *Austria*,[132] in which the prohibi-

[127] http://www.kprm.gov.pl/s.php?id=461, accessed 27 April 2008.
[128] Published in: Dz.U. 2008 No 75 item 450, to find in Polish: http://isip.sejm.gov.pl/prawo/index.html, http://www.kprm.gov.pl/s.php?doc=1359, accesssed 30 June 2008.
[129] http://orka.sejm.gov.pl/SQL.nsf/ustawyall?OpenAgent&6&14, accessed 27 April 2008.
[130] http://www.senat.gov.pl/k7/dok/dr/spis2.htm, accessed 27 April 2008.
[131] http://orka.sejm.gov.pl/SQL.nsf/ustawyall?OpenAgent&6&14, accessed 27 April 2008.
[132] Judgment of the Court (Grand Chamber) of 1 February 2005 in Case C-203/03: *Commission of the European Communities* v *Republic of Austria*, OJ 2005/c82/07, http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2005:082:SOM:en:HTML accessed 2 May 2008.

tions laid down in this convention were considered to violate Articles 2 and 3 of Directive 76/207/EEC.

Case law national courts

In the last few months of 2007 two important court decisions on gender equality were delivered by the Polish courts. Their common feature was the non-typical circumstances surrounding the discrimination which had taken place.

Discrimination of men in social security

The first one is the decision by the Constitutional Court of 23 October 2007,[133] dealing with the discrimination of men in social security law. It referred to the Act of 17 December 1998 on Pensions from the Social Insurance Fund.[134]

Article 29 of the above-mentioned Act provides a woman with a right to earlier retirement in two situations: (1) when she has turned 55 and has paid social security contributions for at least 20 years and is at the same time recognised as being completely incapable of working, (2) when she has turned 55 and has paid social security contributions for at least 30 years. Under this Act a man is entitled to earlier retirement in one situation only: when he is at least 60 and has paid social security contributions for at least 25 years and has been recognised, at the same time, as being completely incapable of working.

The Constitutional Tribunal declared that this provision is unconstitutional (since it is incompatible with Article 32 containing the non-discrimination clause and Article 33 relating to the principle of equality between women and men under the Polish Constitution of 1997)[135] in as far as it refuses to grant the right to earlier retirement to men unless they are incapable of working. According to the decision of the Constitutional Tribunal, in order to bring the law into compliance with the Constitution, a general possibility should be provided for men to retire earlier. In response to this decision by the Constitutional Tribunal, Poland's Labour Ministry has drafted an amendment to the retirement law according to which men born before 1949 who have turned 60 and have been paying social security contributions for at least 35 years have a right to earlier retirement.[136]

Discrimination on grounds of age and appearance

The Supreme Court (the Labour and Social Security Chamber), in its decision of 4 October 2007 (I PK 24/07),[137] considered as ill-founded the cassation claim brought by an employer against a female employee who had alleged that she had been harassed and discriminated against on the grounds of age and appearance. The perpetrator was a female superior who, in the opinion of the plaintiff, had treated unequally – without any rational justification – all her subordinates who were young and attractive. Amongst them was the plaintiff who had been offended and humiliated by her attitude, as well as being forced to work overtime, subject to unequal conditions,

[133] P 10/07 OTK ZU 2007 No 9a, item 107, http://www.trybunal.gov.pl/OTK/otk.htm. accessed 27 April 2008.
[134] Consolidated text published in: Dz.U. 2004, No 39, item 353 with further amendments.
[135] Dz.U. 1997, No 78, item 483 with amendments.
[136] The amendment was passed by Parliament on 23 March 2008 and published in: Dz.U. z 2008 r. No 67, poz. 411, see: http://isip.sejm.gov.pl/servlet/Search?todo=open&id=WDU20080670411, accessed 15 June 2008.
[137] Case I PK 24/07, unpublished.

compared to the other employees. The plaintiff informed her superiors about this situation but they did not react and did not prevent her dismissal. The court of first instance acknowledged that discrimination had taken place and considered the behaviour of the employer to have violated Article 18(^{3a})(1) of the Labour Code[138] and decided that the plaintiff should be awarded compensation amounting to PLN 10 000 (approximately EUR 3 000). This verdict was upheld by the Appeal Court. The Supreme Court explained, while dismissing the claim, that, firstly, the plaintiff had been harassed within the meaning of Article 18(^{3a})(5) point 2 of the Labour Code[139] by the superior's conduct, which violated her dignity and humiliated her. The employer was found liable for discrimination since it tolerated this situation. Secondly, it was established that the plaintiff's young age and attractive appearance were the basis for this harassment, since the catalogue of the grounds of discrimination provided for in the Labour Code is not limited. Therefore 'appearance' might be such a ground.

It may be added that the above case proved that the criticism that the Polish implementation of EU directives was misleading was indeed well-founded.[140] It was pointed out that the Polish legislator, while defining 'ordinary' harassment, had 'lost' the relationship between objectionable behaviour and an employee's sex, race, age, sexual orientation etc. This leads to the situation where, e.g., any mental harassment of an employee, regardless of its background or underlying reason, could be acknowledged as harassment within the meaning of the anti-discrimination regulations in the Labour Code. Such a solution provides employees with wider protection than EU regulations, although it does not correspond with the anti-discrimination character of the regulations with which it is closely associated and leads to the obliteration of the difference between harassment and bullying, as referred to in Article 94(^{3k}) of the Labour Code.

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[138] The Labour Code dated 26.06.1974 as amended (consolidated text: Dz.U. 1998, No 21, item 92, as amended). As a result of two amendments, Section IIa of the Labour Code currently called 'Equal treatment in employment' was modified, thereby enabling the application of provisions contained therein also to instances of discrimination based on reasons other than gender. Article 18(^{3a})(1) of the Labour Code reads as follows: 'Employees should be treated equally within the scope of initiating and terminating an employment relationship, conditions of employment, promotion as well as access to training for the purpose of improving raising job qualifications, in particular regardless of sex, age, disability, racial or ethnic origin, religion, faith, sexual orientation as well as regardless of whether they are employed for a definite or an indefinite period of time, or have a full-time or part-time job.'

[139] Under Article 18(^{3a})(5) of the Labour Code discrimination also includes: (1) an activity based on encouraging another person to infringe the principle of equal treatment in employment, (2) certain behaviour, the purpose or consequence of which is the violation of the dignity or the humiliation or abasement of the employee (harassment). 'Discrimination also includes any unacceptable behaviour of a sexual nature or references to the sex of an employee, the purpose or consequence of which is the violation of the dignity, the humiliation or abasement of an employee; such behaviour can comprise physical, verbal or non-verbal elements (sexual harassment).' (§ 6).

[140] Compare e.g.: I. Boruta 'Zakaz dyskryminacji w zatrudnieniu – nowa regulacja prawna' (Prohibition of discrimination in employment - new regulation), *Praca i Zabezpieczenie Społeczne* 2004 No 2 pp. 3 *et seq.*

PORTUGAL – *Maria do Rosário Palma Ramalho*

Introduction

In Portugal, gender equality has been developed for more than 30 years, following the Portuguese Revolution of 1974 and the approval of the new Constitution in 1976, which formally established the gender equality principle as a fundamental right.[141]

This principle has since resulted in wide-ranging legislative developments in the area of equal opportunities in the access to employment and at work, in facilities for maternity, paternity and the reconciliation of family and working life, in social security issues and in family rights and responsibilities. Along the years, these provisions have also been extended to areas other than the field of employment, social security and family (e.g. gender equality in the field of politics and in decision making) and to other sources of discrimination besides gender (e.g. age or sexual orientation). Although some of this legislation was introduced prior to Portugal's accession to the European Union in 1985, EC law and EC jurisprudence have played a very important role in the national developments in this area.

The national provisions in this area are generally consistent with EC law. However, the main problem of gender equality provisions in Portugal currently is – as it has always been – a problem of practical implementation, since public survey is insufficient and most women do not file any complaints regarding discriminatory practices or bring their cases before the courts. Therefore, although in the formal sense it is complete and adequate, in general, the system is, in fact, not very effective.

Legislative developments

Implementation of Directive 2004/113/EC

In March 2008, Portugal completed the process of transposing Directive 2004/113/EC, of 13 December 2004, regarding non-discrimination in access to goods and services into national legislation.[142]

The national legislation has a broad scope, since its ruling is applicable to private and to public sectors and is in accordance with the Directive, concerning the concepts of direct and indirect discrimination, harassment and sexual harassment, and the rules regarding the enforcement of its legal provisions, such as the right to have access to justice, the reversal of the burden of proof, and the right of NGOs and other associations related with gender rights or with the protection of consumers to participate in and to promote legal actions regarding theses issues.

The implementation of this legislation is to be monitored by the CIG (the Commission for Citizenship and Gender Equality).

The legislation goes beyond the requirements of Directive 2004/113/EC in areas such as actuarial factors, since the rules imposed by the national legislation are generally applicable to all contracts and not only to contracts entered into after December 2007; in contrast, in other areas the law establishes a period of delay – this is the case for insurance contracts that involve pregnancy and maternity and here these legislative provisions will only enter into force on 1 December 2009, unlike all the other provisions which will enter into force immediately.

[141] Portuguese Constitution, article 13.
[142] Law No 14/2008, 12 March 2008.

Finally, the law contemplates a complete system of sanctions in order to ensure its practical implementation.

In April 2008, new legislation has been approved regarding insurance contracts.[143] In this new Act, it is to be noted that there is a new rule regarding discriminatory clauses integrated into insurance contracts (Article No 15). This rule prohibits all discriminatory practices in entering into insurance contracts, as well as in the execution and the outcome of those contracts. This rule relies directly on the principle of equality, as laid down in the Portuguese Constitution,[144] but deals especially with discrimination that may arise from a deficiency or serious health risks. This ruling is not applicable to gender discrimination.

Despite the general principle of non-discriminatory practices and clauses in these contracts, the law allows for differences in insurance contracts, provided that they consist of practices and technical evaluations which are objectively founded, confirmed by actuarial data, and are in accordance with the principles of the insurance sector.

ROMANIA – *Roxana Tesiu*

Introduction

Gender equality does not represent an area of concern for the Romanian Government except declarations that are made to confirm gender equality principles. The basic approach is that equal opportunities for women are guaranteed and other equality topics are of concern, such as Roma population rights. One of the most important topics on the government's agenda and in mass media is to express concerns over the decrease of the Romanian population, which in many cases is considered a direct consequence for the new life agenda of young women: preoccupation with career development and less attention for traditional life models, centred on family and bringing up children.

The main concepts of EU gender discrimination law have been implemented in Romania gradually and, in many situations, due to the requirements of the EU membership. Since 2002, when the Law on Equal Opportunities for Women and Men was adopted, EU legal provisions addressing gender discrimination started to be transposed into the national legislation. As a general remark, it has to be stated that the gender discrimination legal framework is rather a recent one and pertinent court decisions are still to be rendered as instruments for implementing such legal provisions.

Legislative developments

A new legal framework for applying the principle of equal treatment for men and women with regard to occupational social security schemes

On 19 March 2008 Parliament adopted Act No 44 in order to approve Emergency Ordinance No 67 of 27 June 2007 referring to the application of the principle of equal treatment for men and women in occupational social security schemes (hereafter referred to as the principle of equal treatment). As a result of the discussions between the Romanian authorities and experts from the European Commission it was established that until 1 July 2007 all Romanian legal provisions contrary to the principle of

[143] Decree Law No 72/2008, 16 April 2008.
[144] Article 13 of the Portuguese Constitution.

equal treatment for men and women in occupational social security schemes should be amended. The effective application of the principle of equal treatment should be attained by 31 December 2008 at the latest. If the established deadline cannot be met, the respective legal provisions shall be declared null and void. Such an emergency procedure is required in order to avoid an infringement procedure being initiated against Romania.

According to the European standards to be transposed into the national legislation with regard to the application of the principle of equal treatment, any direct or indirect discrimination based on sex shall be removed, including in relation to the retirement age for women and men, as well as pension contributions and the length of service. Article 2 of the Emergency Ordinance[145] provides that 'occupational social security schemes' means those schemes aiming to provide workers, whether employees or self-employed in an undertaking or groups of undertakings, with benefits designed to supplement or replace the benefits prescribed by statutory social security schemes. Occupational social security schemes are defined without any distinction between compulsory or optional membership.

According to Article 3 of the Emergency Ordinance, a social security scheme will be considered as an occupational scheme if it refers to a particular category of workers, is directly linked with the length of service, and if the pensions are calculated based on reference to the worker's last salary or to the average last salary. The Emergency Ordinance shall apply to the active working population, including the self-employed, persons whose activity is interrupted by illness, maternity, an accident or involuntary unemployment and persons seeking employment, as well as to retired and disabled persons and to those claiming rights on their behalf.

The provisions of the Emergency Ordinance shall apply to:

- Occupational schemes that provide protection against illness, invalidity, old age including early retirement, work-related accidents and occupational sickness, and unemployment; and
- Occupational schemes that provide for other social benefits, either in cash or in kind, in particular survivors' benefits and family allowances, if such benefits are granted to employed persons and therefore constitute paid advantages by the employer to the worker by reason of the latter's employment.

Based on the legal provisions of Article 6(1) of the Emergency Ordinance (No 67), it shall not apply to:

- Individual social insurance contracts for self-employed workers;
- Social security schemes having only one member;
- Insurance contracts to which the employer is not a party (in the case of paid workers);
- Optional provisions of social security schemes offered to participants individually in order to guarantee them supplementary benefits, a choice of dates on which the normal benefits for self-employed workers will start or a choice between several benefits; and
- Occupational social security schemes as far as benefits are financed by salaried workers on a voluntary basis.

The legal provisions contained in Article 7 of the Emergency Ordinance establish that:

[145] Emergency Ordinance No. 67

1. The principle of equal treatment implies the absence of any direct or indirect sex-based discrimination, by reference in particular to marital or family status, especially with regard to:
   – the scope of the schemes and the conditions by which to access them;
   – the obligation to contribute and the calculation of the contributions;
   – the calculation of the benefits, including supplementary benefits due to spouses or dependants, as well as with regard to the conditions governing the duration and the maintenance of the right to benefits.
2. The principle of equal treatment shall not prejudice the legal provisions referring to maternity protection as provided by the law and collective bargaining contracts.

Provisions contrary to the principle of equal treatment are those based on sex, either directly or indirectly, by reference, in particular, to marital or family status, establishing:

a. Those persons who can participate in an occupational scheme;
b. The compulsory or voluntary participation in an occupational scheme;
c. Different rules with regard to the age of entry into the scheme, the minimum period of employment or membership of the scheme;
d. Different rules for the reimbursement of contributions, except for those provided under paragraphs (h) and (i) infra, when a worker or a self-employed person leaves a scheme without meeting the conditions that would guarantee him or her a deferred right to a long-term benefit;
e. Different conditions for granting benefits or for limiting these benefits for either men or women employees;
f. A different retirement age;
g. Suspending the retention;
h. Different levels of benefits, with the exception of consideration being given to the actuarial calculation factors that differ according to sex, in the situation of occupational schemes based on determined contributions;
i. Different levels of contributions for workers or self-employed persons;
j. Different levels of contributions for employers' contributions, with the exception of occupational schemes based on determined contributions, if the objective is to equalise the amount of benefits in order to bring them closer for men and women. Another exception refers to the situation in which occupational schemes based on determined contributions are financed through accumulation and employers' contributions are meant to ensure the adequate private character of the funds necessary to cover the cost of the determined benefits; and
k. Different standards or standards which are only applicable to a specific gender of workers or self-employed persons, with the exception of those provided for under the above subparagraphs (h) and (i), as regards the guarantee or retention of entitlement to deferred benefits when a worker leaves a scheme.

Administrators of occupational social security schemes have to respect the principle of equal treatment in providing the benefits. In this regard, the competent authorities will not allow the functioning of these schemes to be based on provisions contrary to the principle of equal treatment.

A new legal framework for providing day-care and education services for children up to the 4th school year

The Minister for Labour, Social Solidarity and Family, acting through the National Authority for Protecting Children's Rights, submitted to Parliament in early March 2008 a draft Law on setting up, organising and the functioning of services for the daily education and daily care of children. Such a legal initiative is extremely important considering that, according to official information released by the National Institute for Statistics, the number of day-care centres for children was 5 687 for the school year 2004-2005, while in the 2005-2006 school year the number had decreased to 3 769. The same decreasing trend was registered in the following years. The beneficiaries of the services provided under the draft Law are children of Romanian citizens with their domicile or place of residence in Romania, as well as children of foreign citizens whose domicile or place of residence is in Romania. The basis of the legal proposal is the requirement for Romania to comply with its obligations as a EU Member State with regard to meeting the targets established by the 2002 Barcelona Spring European Council. It is urgently required that Romania develops day-care services for young children in order to facilitate women's participation in economic life.

The legal provisions laid down in Articles 7 and 8 introduce, for the first time under Romanian law, the concepts of 'nursemaid' and 'babysitter'. According to the draft Law, a nursemaid is an authorised person engaged in the activities of care and education provided at that nursemaid's own home. A babysitter is a person offering child care at the child's home, based on a contract agreed upon between the parents, the babysitter and a babysitting agency duly authorised under the present draft Law.

Daily education and care services shall be set up as public or private services and shall be authorised under the standards laid down in the draft Law. Private daily education and care services shall be set up by natural or legal persons. Public daily education and care services shall be set up based on a decision by local administrative authorities and under their purview, without benefiting from having a distinct legal personality. According to the new standards proposed by the draft Law, daily education and care services will be set up as nurseries designed for children aged between 3 months and 3 years, and day-care centres for children aged over 3 years up to the end of the 4th school year. The personnel foreseen by the law for daily education and care nurseries and centres will not be medical personnel, but staff with a specific professional background. For the first time under Romanian law, the concept of 'education for parents' is introduced. Special and strict legal conditions for authorising babysitting agencies are provided under the law in order to guarantee a safe and quality-based functioning environment for children. A very important legal standard introduced by the draft Law refers to the compulsory condition that has to be met by local public administration authorities with regard to evaluating the need for daily care and education services available for children in a certain community and assuring available places according to the identified need.

SLOVAKIA – *Zuzana Magurová*

Policy developments

The institutional framework of gender equality is still insufficient in Slovakia. One of the key problems is based on an insufficient budget allocation for the work of the relevant institutions working in the area of gender equality, such as the Slovak Na-

tional Centre for Human Rights. Even though the Centre is regarded by the Government as the gender equality body, it does not have a special division on gender equality with sufficient funding and gender equality experts. The same applies to the Government Council for Gender Equality.

The Government decided to set up the Gender Equality Council of the Government of the Slovak Republic with effect from January 2008. The Council is a coordinating, consulting, advisory and initiative body of the Government for the implementation of the principle of gender equality that will propose measures and coordinate activities aimed at the promotion of gender equality with a view to preventing discrimination based on sex. The Council is composed of the following bodies: the Executive Committee (consisting of experts on gender issues from the individual ministries and state authorities) and the Consulting Committee (consisting of NGO representatives and representatives of academic institutions working in the area of gender equality).

Legislative developments

In Slovakia a law on gender equality itself, as opposed to the national strategy concerning gender equality, has still not been adopted.

The process of adopting the Anti-discrimination Act was very complicated and lengthy, accompanied by an unwillingness on the part of political parties and the Government to approve it. The Act was finally adopted in 2004.[146]

Amending the Anti-discrimination Act

The first change occurred with the adoption of Act No 326/2007 Coll.,[147] amending the Anti-discrimination Act, in response to two formal notices that the Commission of the European Communities sent to the Slovak Republic. In the second notice the EC Commission objected to the incomplete or incorrect transposition of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

The main purpose of the second fundamental amendment to the Anti-discrimination Act[148] that entered into force on 1 April 2008, is the transposition of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in access to and the supply of goods and services. The proposals and comments resulting from the collective public comments submitted in March 2007 to the previous amendment to the Anti-discrimination Act, among others the requirement for the transposition of the Directive of the European Parliament and the Council 2002/73/EC, amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, were also incorporated in the approved amendment. Finally, this requirement also resulted from the third formal notice of the Commission of the European Communities.

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[146] Act No 365/2004 Coll. on Equal Treatment in Certain Areas and on Protection against Discrimination, Amending and Supplementing Certain Other Laws, as amended, effective from 1 June 2004.

[147] Act No 326/2007 Coll. amending Act No 365/2004 Coll. on Equal Treatment in Certain Areas and on Protection against Discrimination Amending and Supplementing Certain Other Laws.

[148] Act No 85/2008 Coll. amending Act No 365/2004 Coll. on Equal Treatment in Certain Areas and on Protection against Discrimination Amending and Supplementing Certain Other Laws.

The amendment has extended the grounds under which it is prohibited to breach the principle of equal treatment, as well as areas in which the obligation to observe the principle of equal treatment is laid down.

It also increased the protection of persons against harassment by the introduction of the explicit prohibition of sexual harassment that has not been contained elsewhere in our national legislation. The adoption of the definition of sexual harassment was rather regarded as a necessary evil, which was required by the EU legal harmonization process. However, even this definition has some shortcomings as it does not mention that sexual harassment is an 'unwanted' conduct (so the definition lacks the terms unwanted or undesired). In general, sexual harassment is still not regarded as a problem by the general public and the Government.

The amendment has repeatedly introduced temporary affirmative action (literally a 'balancing measure') for disadvantaged groups of the population. In the initially submitted proposal the formulation 'Discrimination is not the adoption of temporary balancing measures by the state administration bodies leading to the removal of disadvantages resulting from reasons such as racial or ethnic origin, membership of a national minority or ethnic group, sex, age or handicap, that are aimed at the achievement of equality of opportunities in the practice'. The amending proposal by the Chairman of Parliament's Constitutional Committee, Mamojka, the deputy for the Smer-SD party, repealed the ground of ethnic and racial origin and sex and replaced it with the ground of social and economic disadvantage. It also reacted to the objections raised by the deputy for the KDH, Lipšic, who argued that the ground of ethnicity was contrary to the Constitution. (Deputy Lipšic also initiated the action before the Constitutional Court immediately following the adoption of the Act in 2004. By its decision of 18 October 2005 the Constitutional Court repealed the provision on temporary balancing measures). Although it only objected to the unconstitutional character of ethnicity, the deputies removed the ground of sex as well. According to the adopted amending proposal, discrimination is not the adoption of temporary compensatory measures by state administration bodies aimed at the removal of forms of social and economic discrimination resulting from reasons such as age and handicap that are aimed at the attainment of equality of opportunities in practice.

Slovak National Centre for Human Rights

Act No 308/1993 Coll. on the Slovak National Centre for Human Rights, as amended, was also further amended, and the Centre's scope of competences was extended. The Centre is an independent legal entity that performs tasks in the area of human rights and basic freedoms, including the rights of children. In this respect, the Centre in particular: monitors and assesses the observance of human rights and the observance of the principle of equal treatment, gathers and provides, upon request, information on racism, xenophobia and anti-Semitism, carries out research and surveys the provision of information in the area of human rights, and gathers and disseminates information in this area, prepares educational activities and takes part in information campaigns aimed at increasing tolerance in society; it further ensures legal aid for victims of discrimination and expressions of intolerance, issues at the request of natural or legal entities, or at its own initiative, expert standpoints on matters relating to the observance of the principle of equality of treatment, provides library services and provides services in the area of human rights.

The Centre provided legal advice and legal aid in matters relating to discrimination, expressions of intolerance, and the violation of the principle of equal treatment, as well as in other cases where rights were violated. A key competence of the Centre

is the authority to represent a party in proceedings relating to the violation of the principle of equal treatment.

However, in practice its capacity, particularly of experts in gender equality, was not extended and the budget was not increased.

Birth allowance

The amendment to Act No 235/1998 Coll. on the Birth Allowance, which entered into force on 1 February 2008, has provoked great discussion as a consequence of the different opinions as to whether or not the amendment is discriminatory. The birth allowance is a state social benefit by which the state contributes to the increased expenses related to the necessary needs of a child that has been born to the mother and has lived for at least 28 days. The person eligible for the payment of the birth allowance is the child's mother, in the first place. The father of the child is eligible when the child's mother has died, when she is officially missing, or when the court has entrusted the child to the father's care. By the said Amendment the amount of the allowance upon the birth of the first child has been increased from SKK 11 000 (EUR 316) to SKK 20 440 (EUR 587) (the allowance for the second, third or following child is SKK 4 560 (EUR 131)), but new conditions for its payment have been introduced as well. The birth allowance shall not be paid to a mother who has left her child at a health establishment after the birth without the consent of her doctor, or who has not participated in monthly preventive gynaecological examinations starting from the 4th month of pregnancy. The fulfilment of these conditions may be problematic, particularly in the case of Romany women who often distrust gynaecologists and hospitals (also for legitimate reasons such as discrimination, verbal abuse, and negative stereotyping) or have a problem with the infrastructure. According to the opinion of some non-governmental organisations, this amendment is indirectly discriminatory not only in relation to Romany women, but also in relation to other disadvantaged groups of women – e.g. to women living in rural areas, to women who raise their children alone – because they may not always be able to ensure alternative care for dependent persons during their visits to antenatal clinic.

Equality body decisions/opinions

Every 31st of January, the Slovak National Centre for Human Rights shall publish an annual report on the observance of human rights during the previous year. However, the annual report for 2007 is still not available.

SLOVENIA – *Tanja Koderman Sever*

Policy developments

It seems that a lot has been done in recent years in order to implement EU gender equality legislation. However, legislation alone does not ensure actual gender equality in society. For this reason, several non-legislative measures to improve the status of women and to ensure sustainable development in the realisation of gender equality have been taken as well. In 2005, the Resolution on the National Programme for Equal Opportunities for Women and Men, covering 2005-2013, was adopted. It defines objectives and measures on the one hand, and on the other hand key policy makers for promotion of gender equality in different areas of life of women and men

in the Republic of Slovenia in the period 2005 - 2013. On the basis of this Resolution, concrete tasks and activities for the achievement of the objectives and implementation of measures are determined in periodic plans every two years. They stipulate in more detail the timetable and manner of implementation of separate tasks and activities.

However, statistics show that women are still under-represented at all levels of political decision-making at national and local level, and in decision-making positions in the area of economy, trade unions, associations, organisations, and in decision-making posts in public administration and justice. In addition, gender stereotypes are still deeply rooted in Slovenian society. This shows that more measures should be taken in order to promote and achieve gender equality in different areas of life using an approach which recognizes the specific problems and circumstances in which gender equality exists. Gender equality must become an important issue for policy makers, at least as important as the issues of the Roma and the disabled, which now seem to be more pressing and politically important than the situation of women.

However, there are some policy developments to be mentioned. The association of communes of Slovenia has called upon the Government to sign the European Convention on equality between women and men in local self-management.

In the Development Report 2008 prepared by the Institute of Macroeconomic Analysis and Development which monitors the realization of Slovenia's Development Strategy that was adopted in 2005, it is stated that the number of unemployed women in 2007 declined after it had risen during the period 2000-2006 and that the number of employed women is above the European average. In addition, it is suggested in the same report that greater progress should be achieved by adopting measures on the reconciliation of work and private life and at ensuring equal access to employment for women and men.

The Government decided to repeal Convention 45 of the International Labour Organisation concerning the Employment of Women on Underground Work in Mines of all Kinds.

During the Slovenian Presidency, the Ministry of Higher Education, Science and Technology organized a workshop entitled 'Family-friendly scientific careers – towards an integrated model' that was devoted to discussions on setting up appropriate conditions for the development of scientific careers. Special attention was given to the young and to women, as well as to their opportunities for becoming involved in research activities. Participants formed directions which will likely be adopted as recommendations by Ministers of Member States at the Competitiveness Council in May.

The Chairman of the Commission for Petitions, Human Rights and Equal Opportunities of the Slovenian Parliament, after having discussed the Report on equality between women and men, stressed that Slovenia is very successful in combating the gender pay gap but still has a lot to do in providing quality working posts for women since the difference in pay is higher as far as higher levels of education are concerned.

Legislative developments

On 13 November 2007, amendments to the Employment Relationship Act[149] were adopted. These amendments also define more precisely direct and indirect discrimination, sexual and other harassment, prohibit bullying and impose an obligation for em-

[149] *Zakon o spremembah in dopolnitvah Zakona o delovnih razmerjih (ZDR-A), Ur.l. RS, št. 103/07.*

ployers to facilitate the reconciliation of professional and family life, including flexible working arrangements.

The new Slovenian Criminal Code is in the process of being adopted. It devotes significant attention to criminal acts committed within the sphere of employment relationships with special emphasis on the protection of workers' rights and it introduces two new criminal offences related to gender (obstructing a woman from becoming pregnant or from having a baby when concluding an employment contract and during the duration of an employment relationship and bullying).

Case law national courts

The Administrative Court of the Republic of Slovenia decided a case on 20 March 2008[150] concerning the leasing of a non-profit apartment. In a lawsuit the female plaintiff also claimed, as one of the grounds, indirect discrimination based on gender which results from 'the Act of the Ministry on leasing non-profit apartments' (the Act). The Act determines the criteria that must be fulfilled by a young family in order to be placed on a priority list for the allocation of a leased non-profit apartment. According to those criteria, parents shall not be older than 35 years and must have at least one child. Since the plaintiff's husband was older than 35 years they failed to be placed on the priority list and were therefore not allowed to lease a non-profit apartment. In the lawsuit she alleged indirect discrimination based on sex because men, in general, have children when they are older than women and are therefore discriminated by the above-mentioned condition based on age which is equal for both genders. Finally, she proposed setting fair, non-discriminatory conditions for a young family, possibly based on the age which differentiates between sexes according to statistical data or solely on the basis of the age of the children.

The Administrative Court rejected the above-mentioned claim because she did not comply with the conditions defined by the Act which were fixed in the same way for all persons participating in a public competition. The Court decided that the criteria are equivalent for all and are therefore compatible with the principle of equal treatment.

This judgment cannot be appealed; however, the Act in question has been challenged before of the Constitutional Court which will have to decide whether the Act is in conformity with the Constitution as well as with the law.

'The Advocate for Equal Opportunities for Women and Men and the Principle of Equal Treatment' (the Advocate) issued a written opinion on that matter in a separate procedure before the Office for Equal Opportunities in which she stated that this is a positive action measure and that an unequal treatment of women and men cannot be found.

Equality body decisions/opinions

In April 2008 the Government adopted the Annual Report on the work of the Advocate in 2007.[151] According to this report the Advocate decided 47 cases in 2007. The majority were related to discrimination in working relations and employment and discrimination based on the ground of sex.

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[150] Administrative Court of the Republic of Slovenia, judgment No U947/2007-12 of 20.03.2008.

[151] http://www.uem.gov.si/fileadmin/uem.gov.si/pageuploads/PorociloZagovornica2007.pdf, accessed 27 April 2008.

Miscellaneous

On 2 October 2007, the Social Agreement[152] was finally signed by representatives of the Government, employers and employees. One of its 19 chapters deals with ensuring equal opportunities and respect for diversity.

The report on women in political decision-making was prepared for the governmental Office for Equal Opportunities by Antić Gaber, Rožman and Šepetavc. It includes data from 1999 to 2007 following nine indicators (eight qualitative and one quantitative) in relation to the position of women in political decision-making bodies at local, regional and national levels in all 27 EU member states. The report states that there has been a slight, but constant improvement in the participation of women in those bodies. The report was presented in January 2008 at the meeting of the High-Level Group for Gender Mainstreaming within the framework of the Slovenian Presidency.

On 17 January 2008, the General Assembly of 'the Women's Lobby of Slovenia' (WLS) was held in Ljubljana. A candidate for the presidency of the WLS believes that Slovenian women and men do not have equal opportunities because of the feminization of certain professions and gender stereotypes. As one of the priorities of this year's WLS activities she mentioned activities during the campaign for elections to Parliament which will be held in September 2008.

On 30 January 2008 the conference entitled 'Elimination of Gender Stereotypes: Mission (Im)Possible?' took place in Slovenia. The Conference addressed possible ways to eliminate traditional gender roles and gender stereotypes, especially in the areas of education, training, the labour market, culture and the media. The conference was followed on 31 January 2008 by the Informal Meeting of Ministers for Employment, Social Affairs and Gender Equality which is the most important event in the area of gender equality during the Slovenian Presidency of the Council of the EU.

SPAIN – *Berta Valdés*

Policy developments

The last socialist Spanish Government reinforced the action on social politics and especially in the fields of equality and non-discrimination on the grounds of gender with direct changes to the legislation. The measures had in some aspects been quite intensive and the main opposition Party (the Popular Party) had taken this as a pretext to reject them in the Spanish Parliament and to present to the Constitutional Court several actions against the new laws based on an infringement of fundamental rights and freedoms. Nevertheless, the Constitutional Court has recently validated both Law 1/2004 on Integral Protection Measures against Gender Violence (which established distinct penal treatment for men and women) and Law 3/2007 on effective equality between women and men (stating that all the listed candidates for elections must have a balanced composition of men and women).

With the re-election of the Socialist Party in the political elections (in March 2008) the previous trends should continue, having as a novelty the creation of a specific Ministry of Equality and taking into account that one of the electoral promises was to work on a new law focusing on discrimination. But the first semester of 2008

[152] *Socialni sporazum za obdobje 2007-2009,* Ur.l. RS št. 93/2007.

is now ending with a serious economic crisis which could amend all the promises made with increasing social politics being used as an excuse. However, the effects of the measures implemented by the last legislation and especially the level of fulfilment in enterprises and the role of collective agreements in the development of equality issues still have to be analysed.

Introduction of new instruments on gender equality in Law 3/2007

Law 3/2007 on the effective equality of women and men, which was passed in March 2007, introduced essential elements aimed at promoting progress in gender equality in Spain. From the point of view of public policies, the Law on Equality establishes the general criteria governing the practices of public authorities based on the commitment to the effective right of equality between women and men. For this reason, public administrations must integrate the principle of equality of treatment and equality of opportunity, on a gender mainstreaming basis, in all their practices. Law 3/2007 sets out a number of instruments by which to achieve this effective equality objective, some of which have already been implemented. They are the following:

The creation of an Inter-ministerial Commission on Equality between Women and Men.[153] This Commission is responsible for the coordination of policies and measures adopted by ministerial departments. The Commission's objective is to actively supervise the principle of equal treatment and opportunities in the activities of the State General Administration. Among its functions are the following: the analysis and monitoring of the Strategic Plan on Opportunity, the coordination and supervision of the Government's Periodic Report, overseeing the development and implementation of recommendations made by Reports on the Impact of Gender and of the agreements adopted by the European Union.

The elaboration of the Government's Periodic Report, Relative to the Effectiveness of the Principle of Equality between Women and Men.[154] The Government is obliged to prepare a periodical report on the totality of its actions with regard to the effectiveness of the principle of equality between women and men, and this report must be presented to Parliament. The regulation stipulates the periodicity, the content, and the procedure for the preparation of the report, in compliance with Article 18 of Law 3/2007. The report will be elaborated and approved biennially and is the basic instrument of the Government to evaluate the effectiveness of the principle of equality between women and men in the State General Administration as a whole and in the governmental organisations dependent thereon.

Strategic Plan on Equal Opportunity (2008-2011), approved in December 2007. A Strategic Plan must be elaborated in compliance with what is stipulated in Article 17 of Law 3/2007 and has as its objective the establishment of benchmarks and measures to be carried out by governmental bodies to ensure effective equality. The Strategic Plan has been developed following four guiding principles:

1. the redefinition of the model of citizenship in accordance with gender equality;
2. the 'empowerment' of women, in the dual sense of access to decision-making positions and a new appreciation of women's contributions (the way of exercising power);
3. 'gender mainstreaming'; and
4. the application of instruments to attain gender parity in technological and scientific innovation.

[153] Royal Decree 1370/2007, BOE (Official State Gazette) 01.11.2007.
[154] Royal Decree 1729/2007, BOE (Official State Gazette) 12.01.2008.

In line with the Madrid Autonomous Region's equality promotion policy, a measure has been adopted to foster the presence of women in management posts. Order 998/2008 of 14 April 2008 of the Department of Employment and Women[155] sets out the conditions regulating the concession of places on postgraduate courses for the development of a business administration and management training programme. Official notification is located within the framework of the Grants Leader Programme (postgraduate courses) and is co-funded by the European Social Fund, Competitiveness and Employment Goal (2007-2013).

Legislative developments

The legislative innovations of recent months have not occurred at state level but rather at regional level, in the Autonomous Regions. In Andalusia two regulations were passed, Law 7-07/PL-000006 to promote gender equality in Andalusia[156] and Law 7-07/PL-000007 on preventive and comprehensive protection measures against gender-based violence.[157] The main aim of the law to promote gender equality is to ensure that public authorities exercise autonomous government competences by applying the principle of gender mainstreaming in all their policies. The Law against gender-based violence regulates the competence which Autonomous Governments share with the Central Government in two broad spheres. On the one hand, consciousness-raising and preventive actions against gender-based violence, with education as a fundamental element in terms of promoting equality and eradicating violence. On the other hand, the law implements protection and support actions for women affected by gender-based violence; this seeks to be comprehensive, incorporating psychological, legal or social support, in addition to socio-economic assistance, access to social housing and employment training and promotion.

In the Canary Islands, the Canary Socialist Parliamentary Group presented a bill to Parliament on equality between women and men, which was published in the Official Gazette of the Parliament of the Canaries of 16 January 2008.[158] The aforementioned bill is in the early stages of negotiation; another of its main goals is to ensure public authorities' commitment to including the gender issue in the exercise of their competences.

In the Catalonian Parliament there is also a Law Project dealing with male violence under discussion. One of the main novelties of the draft is the effort to tackle all kinds of male violence (physical, psychological, sexual (also under-age) and economic violence), as well as all kind of fields (family or domestic, at work, social – such as trade and the exploitation of women, genital mutilation, violence as a consequence of military conflicts). The second novelty is the constitution of a Security Pension Fund to cover maintenance payments as established by judicial decisions, when they are not paid by the spouse or partner, so as to reduce the situation of the economic dependence and exclusion of the victim.

Case Law national courts

Becoming pregnant may still lead to a woman being sacked in Spanish companies. Since this conduct is illegal, the employer's action will be deemed to be null and void,

[155] Official Gazette of the Madrid Autonomous Government of 21.04.2008.
[156] Official Gazette of the Andalusian Parliament, 28.11.2007.
[157] Official Gazette of the Andalusian Parliament, 28.11.2007.
[158] http://www.parcan.es/iniciativa.py?numero=7L/PPL-0002, accessed 23 April 2008.

that is, the employer will be obliged to readmit the pregnant woman and pay her the wages corresponding to the days which have elapsed between dismissal and readmission. In the two rulings we shall discuss, dismissal occurred when the employee was pregnant and the employer was informed about her pregnancy. The ruling of the Catalonia High Court of 20 July 2007 endeavours to determine whether knowledge of a pregnancy must be a constituent cause of the dismissal for the latter to be deemed null and void; the conclusion reached is that this is not necessary. The ruling deems null and void any dismissal for reasons other than disciplinary reasons, that is, when it is not proved that the female worker has committed a very serious offence meriting dismissal on disciplinary grounds. Whether or not the employer's decision to dismiss a worker is motivated by discrimination is irrelevant, as anti-discrimination protection prevents dismissal when a person is pregnant and the employer is aware of that fact.

The ruling of Social Court No 31 of Madrid of 21 April 2008 applied Law 3/2007 on the effective equality of women and men to work in the home-help sector for the first time. The employer-employee relation in the 'home-help service' is of a special nature and is governed by Royal Decree 1424/1985, 'trust between the parties' being one of its peculiarities. The courts have interpreted that when trust is broken the continuation of the employer-employee relationship cannot be imposed, and for this reason the notion of unfair dismissal was rejected in this type of relationship. In this ruling, the Judge considered that Law 3/2007 must be applied to this special relation and deemed the dismissal of the pregnant home-help employee to be null and void, which meant that the latter must be readmitted under the same conditions as those pertaining prior to dismissal, in addition to the payment of all wages up until that moment.

Equality body decisions/opinions

Madrid Autonomous Government Advisory Board against gender-based violence
This Board has deemed inadmissible the conclusions of a report published by the Madrid Autonomous Government Social and Economic Council on gender-based violence. This report transmits the notion that women report gender violence encouraged by the measures or benefits provided for in the regulations, which means feigning ill-treatment in order to receive financial assistance. The report has also been criticised by trade unions and women's organisations and groups, which have called for the document to be withdrawn.

SWEDEN – *Ann Numhauser-Henning*

Legislative developments

Bill on protection against discrimination
The single most important event in the area of gender discrimination that has hitherto taken place in 2008 is the presentation of the Government's Bill 2007/08:95 'Stronger protection against discrimination'. The Bill was presented on 13 March 2008 and is to be dealt with by the Swedish Parliament on 22 May 2008. New legislation is planned to enter into force on 1 January 2009.

The Bill implies that the current non-discrimination legislation, including the Equal Opportunities Act[159] and the Prohibition of Discrimination Act[160] and five other

[159] SFS (1991:433).

acts, is merged into a Single Non-discrimination Act implementing the European equality directives.[161] Apart from sex, ethnicity, religion and other beliefs, sexual orientation and disability, protection against discrimination is now also introduced concerning age and transsexual identity/expression. The Equal Opportunities Ombudsman (EOO) and other monitoring bodies will be replaced by a Single Non-discrimination Ombudsman (DO).

Generally speaking, the proposed Act is a recodification of the current legislation and does not imply any major changes. The introductory chapter contains rules on the general aim and the necessary definitions. Chapter 2 contains the prohibitions on discrimination in working life, education, labour-market services, professional activities, membership of certain organisations, goods and services and housing, health-care facilities and social assistance, social security and unemployment insurance and educational grants, military service and in public employment. Chapter 3 concerns active measures in working life and education. Chapter 4 contains the rules on the monitoring bodies – apart from the new DO there is also a Board against Discrimination for certain issues and the Higher Education Board of Appeals. Chapters 5 and 6 contain the rules on sanctions and procedures, respectively.

With regard to gender discrimination it is worth mentioning that the previous statement in Section 1 of the Equal Opportunities Act[162] that the legislation 'had as its goal to improve first and foremost the conditions of women in working life' has been omitted in the new Act. Moreover, the legal requirements on equality plans have been 'softened'. Now any employer with ten or more employees has to make such a plan every year. In the future this obligation will only apply to employers with 25 or more employees and requires an equality plan only every three years. The Act introduces a new type of indemnity (*diskrimineringsersättning)* making it possible to compensate for the discriminatory treatment as such (and not only economic loss) in all areas of society.

The Bill is based on the Governmental Inquiry Report[163] on joint legislation against discrimination.

Parental benefits, etc.

Apart from the bill just described, the Government also recently presented two more bills concerning the area of parental benefits, Bill 2007/08:91 on care support and Bill 2007/08:93 on equality bonus, respectively. Care support is a politically much debated possibility for municipalities to locally decide to introduce a special care support benefit (*vårdnadsbidrag*) for parents wanting to spend time with their very young children (1-3 years of age). The maximum benefit is set at SEK 3 000 (EUR 330) and can be combined with wage-work but cannot be used by parents using public day-care centres for their children. The 'equality bonus' is a special tax credit for the parent having used most of the parental benefit days. This credit is paid out once and when the other parent is using his or her benefits, provided the first parent is actually in paid work. The aim is to provide the economic possibilities for a more equal distribution of parental benefits between the parents as well as to strengthen the

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160 SFS (2003:307).

161 Equal Pay Directive 75/117/EEC, the Equal Treatment Directive 76/207/EEC as amended by Directive 2002/73/EC, Directive 79/7/EEC, Directive 86/613/EEC, the Burden of Proof Directive 97/80/EC, the Race Directive 2000/43/EC, the Equal Treatment Framework Directive 2000/78/EC and the Goods and Services Directive 2004/113/EC (but not the Recast Directive 2006/54/EC).

162 SFS (1991:433).

163 SOU 2006:22.

relation of the child with both parents. The suggested rules will enter into force by 1 July 2008.

Earlier in 2008 a governmental inquiry proposed the introduction of an act against sex-discriminatory advertisements,[164] (*Könsdiskriminerande reklam – kränkande utformning av kommersiella meddelanden*). It was suggested that the new act should be applicable to advertising portraying sexual qualities or gender roles in ways which are generally offensive to women or men. The minister in charge, Nyamko Sabuni, has declared, however, that she has no intention of carrying the proposal any further due to, *inter alia*, the principle of freedom of speech.

Equality body decisions/opinions

In 2007 the EOO took the initiative to follow-up on wage-setting in a number of workplaces with a total of 1 million employees throughout Sweden. Now 568 employers have been checked. Out of 462 'closed' cases, 200 employers (43 %) were found to have participated in discriminatory wage-setting resulting in corrections concerning 4 500 employees having their wages increased by, on average, SEK 1 000 (EUR 110) per month. Nine out of ten employees concerned were women.

Miscellaneous

In 2007 the Government decided to invest SEK 400 million (EUR 44 million) in activities related to gender equality, especially women's health and violence against women. It now turns out that only SEK 148 million (EUR 16.4 million) were put to use in 2007. 'Quality projects take careful planning' is the Government's answer to its critics.

Otherwise, gender equality issues are not very much an issue of current discussion. Gender equality is generally considered to be fairly well developed – women are in paid employment to nearly the same extent as men, social security and the tax system is based on individual rights, etc. Nevertheless, the labour market is still quite segregated when it comes to gender and – as can be understood from what is written above – there are some gender-based differences in pay. This is nothing new, however, and the debate has lately been dominated by the legal reform initially described, merging all Acts on discrimination to date into one, as well as by the current ombudsmen.

UNITED KINGDOM – *Aileen McColgan*

Introduction

In recent years there has been a great deal of discussion in the UK about discrimination/equality in general. June 2007 saw the publication of the consultation paper *A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain*, which proposed the replacement of the existing complex web of anti-discrimination provisions (including those which deal with sex equality) with a single, harmonised Equality Act dealing with all the equality 'strands'. Four months later came the launch of the Commission for Equality and Human Rights, which amalgamated the role of

[164] SOU 2008:5.

the previous Equal Opportunities Commission (which had had responsibility for sex equality) with those of the Commission for Racial Equality and the Disability Rights Commission, and took on responsibility for human rights and equality on grounds of sexual orientation, age and religion/belief. It is to be hoped that any single equality bill will result in the equalising upwards of sex equality legislation to the level currently occupied by race equality. But it is hard to avoid the conclusion that the increased emphasis on other 'strands' has taken the focus off persistent gender inequalities, with little more than lip service being paid to the way in which gender interacts with other protected grounds to produce intersectional or multiple discrimination.

Policy developments

The publication in June 2007 of *A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain* was mentioned above. A period of three months' consultation followed the publication and in June 2008 a further document, *Framework for a Fairer Future: the Equality Bill*, was published. That document makes a number of further proposals but no firm legislative provisions have yet emerged.

As far as sex/gender is concerned, *A Framework for Fairness* proposed, *inter alia*, the extension of protection from discrimination and harassment on grounds of gender-reassignment, and some extension of the prohibition on sex discrimination to cover private membership clubs. No fundamental changes were proposed, however, to the much-criticised individualistic approach to pay inequality (campaigners have been pressing for years for mandatory 'pay reviews' designed to make pay inequalities transparent); and to the very restrictive domestic approach to contract compliance. Further, and despite the commitment in paragraph 1.1 of *A Framework for Fairness* that 'we want to make sure (...) we do not erode existing levels of protection against discrimination', the document proposes reductions in the gender and other 'public duties' imposed on public authorities (in the case of gender only in 2007). This has proven very controversial as has the lack of any radical proposals to deal with the gender pay gap.[165] It is worth noting that the document proposed the retention of the then legal position that, whereas discrimination on the grounds of *perceived* race, sexual orientation or religion/belief, or on the basis of *association with others* of a particular race, sexual orientation or religion/belief was unlawful, discrimination on grounds of sex (as well as age and disability) was regulated only in relation to *the complainant's actual* sex. This will have to change given the ruling of the ECJ in Case C-303/06 (*Coleman* v *Attridge Law*) that Directive 2000/78 applied to protect the claimant against discrimination on the ground of her son's disability.

On 15 May 2008, the Government announced plans to extend flexible working rights to all parents with children under the age of 16. At present the Employment Rights Act 1996 (as amended in 2002) provides that an employee 'may apply to his (or her) employer for a change in his (or her) terms and conditions of employment' if the purpose of the change is to enable the employee to look after a dependent child aged under 6 (or, in the case of a disabled child, 18) or (since 2007) a dependent spouse or civil partner, relative or co-habitee. The change in terms and conditions must relate to hours, times or location of work, and an employee is entitled to make such an application only after being continuously employed by the employer, other

[165] See for example Fawcett Society *Response to: 'Framework for Fairness: Proposals for a Single Equality Bill for Great Britain'* at http://www.fawcettsociety.org.uk/documents/DLR%20response%20final.doc, accessed 15 May 2008 and the TUC consultation response at http://www.tuc.org.uk/equality/tuc-13685-f0.cfm, accessed 15 May 2008.

than as an agency worker, for not less than 26 weeks. It is estimated that the proposed extension will give an extra 4.5 million parents the right to request flexible working hours.

Legislative developments

The provisions of the Equality Act 2006 which provided for the amalgamation of the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission into a single body whose responsibilities also extend to equality on grounds of sexual orientation, religion and belief and age, as well as human rights more generally, came into force on 1 October 2007 and the Commission for Equality and Human Rights came into being on that date.[166]

The Sex Discrimination Act 1975 (Amendment) Regulations 2008,[167] which came into force on 6 April 2008, amend the Sex Discrimination Act 1975 to take account of the decision of the Administrative Court in *Equal Opportunities Commission* v *Secretary of State for Trade and Industry*[168] that the amendments made to the 1975 Act to implement Council Directive 2002/73/EC were not compatible with EC law requirements. The Court was concerned with the definition of sexual harassment in the Act and with the approach to pregnancy discrimination.

The Sex Discrimination (Amendment of Legislation) Regulations 2008[169] amend the Sex Discrimination Act 1975 with effect from 1 April 2008 to give effect to the provisions of Directive 2004/113/EC. The Regulations are intended to reflect the provisions of the Directive which deal with discrimination, harassment and sexual harassment, the burden of proof in court proceedings, *inter alia* by applying the Directive-based definition of indirect discrimination to the areas of the Sex Discrimination Act 1975 with which the Directive is concerned and extending the existing prohibitions of discrimination in these areas explicitly to cover pregnancy and gender reassignment.

Case law national courts

A number of important, if problematic, decisions have been reached in recent months in the area of equal pay.

Equal pay: the justification of pay differentials

The first of these cases is *Cumbria County Council* v *Dow (No 1),*[170] in which the Employment Appeal Tribunal (EAT) suggested that, in a case in which it had been established that a pay practice served to disadvantage women, i.e., where disparate impact was established, an employer would only have to justify the pay practice if it failed to satisfy the tribunal that the pay practice was not 'sex tainted'. The judge went on to declare that 'where there are pay arrangements which on their face appear to reflect historical sexist assumptions about what jobs and rates of pay are appropriate for men and women, it will be a rare case in practice where the employer is able to establish that the pay structure is not sex tainted'. This approach appears to be incompatible with Article 141 in that it fails to require the objective justification of disparately im-

[166] Now referred to as the Equality and Human Rights Commission.
[167] SI 2008 No 656.
[168] [2007] ICR 841.
[169] SI 2008 No 963.

pacting pay practices *as a matter of course* (as distinct from where they are tainted by *direct*, albeit *covert*, discrimination).

Equal pay: time limits for litigation

Cumbria County Council v *Dow (No 2*) concerned time-limits.[171] The Equal Pay Act 1970 provides[172] that time begins to run from 'the last day on which the woman was employed in the employment'. The relevant period is six months, subject to a number of very limited exceptions. In *Dow (No 2)* the EAT ruled that the time-limit began to run from any point at which there was a change to the employee's terms of employment in respect of their status, hours or duties, where that change was managed by the termination of one contract of employment and the issuing of another. The EAT ruled that time had begun to run for the claimant at the point at which her contractual weekly hours were varied from 37 to 30, in a case in which the employer issued a fresh contract which stated that its terms 'supercede[d] any previous contract of employment'. Leave was given to appeal to the Court of Appeal. This decision appears to be in stark conflict with *Preston* v *Wolverhampton*[173] in which the ECJ ruled that the UK's time-limit of six months ran, in the case of workers who had been employed on a number of 'separate contracts of employment for the same employer covering defined periods of time and with intervals between the periods covered by the contracts of employment', from the end of the *last* of these contracts where there 'had been a stable employment relationship resulting from a succession of short-term contracts concluded at regular intervals in respect of the same employment to which the same pension scheme applied'. The Equal Pay Act was amended to provide that 'In a case which is a stable employment case (…) the qualifying date is the date falling six months after the day on which the stable employment relationship ended.'[174] A 'stable employment case' is defined as 'a case where the proceedings relate to a period during which a stable employment relationship subsists between the woman and the employer, notwithstanding that the period includes any time after the ending of a contract of employment when no further contract of employment is in force.' [175]

The decision in *Dow (No 2)* relied on the somewhat bizarre assertion that the 'stable employment' amendments to the Equal Pay Act designed to reflect the decision of the ECJ in *Preston* had no application. It is not clear why the amendments were taken not to apply, unless it was because there had never been a conscious break in employment of the type dealt with in *Preston* (a series of fixed-term contracts with gaps in between). Yet if this is the basis for the distinction, then it has the bizarre result that those whose employment relationships are *truly* stable, in the sense that they continue to work for a single employer without a break, albeit with one or more issues of fresh contractual terms, will be *less* protected than their short-term contract colleagues.

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[170] [2008] IRLR 91.
[171] [2008] IRLR 109.
[172] Section 2ZA(3).
[173] Case C-78/98 *Preston* v *Wolverhampton* [2000] ECR I-03201.
[174] Section 2ZA(4).
[175] Section 2ZA(2).

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